Supreme Court, U.S.
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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1996

EVA M. GATES, Petitioner,

v.

THE COUNTY OF SAN LUIS OBISPO; SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO; PORT SAN LUIS HARBOR DISTRICT; SINSHEIMER, SCHIEBELHUT & BAGGETT, A PROFESSIONAL LAW CORPORATION; STEVEN J. ADAMSKI; ROBERT K. SCHIEBELHUT; JUDGES: WARREN C. CONKLIN; R. DONALD CHAPMAN; HARRY E. WOOLPERT; BARRY HAMMER; AND CHRISTOPHER MONEY; AND DOES 1 THROUGH 10, Inclusive,

Respondents,

On Petition For Writ Of Certiorari
To The Court of Appeal of the State of California
Second Appellate District, Division Six; To The Superior Court of San Luis Obispo County, State of California

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does amending previously signed and entered orders, to less than all causes of action, without notice to plaintiff, and absent a noticed motion for reconsideration mandated by California Code of Civil Procedure section 1008, App. 80, violate due process clause of the Fourteenth Amendment of the United States Constitution and principals established in Ford Motor Co. v. Superior Court, 35 Cal.App.4th 997 (1995); Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66, 85 S.Ct. 1187 (1965).

2. Did the Court violate the due process clause of the Fourteenth Amendment of the Constitution of the United States and principles established in Bello v. Walker, 849 F.2d 1124 (3rd Cir. 1988), Bank of America v. Superior Court (Aug. 1942) 20 Cal.2d 697, American Nat. Bank v. Stanfill, 205 Cal.App.3d 1089, 1095, 250 Cal.Rptr. 861 (1988) by taking further action absent jurisdiction, entering amended orders altering rights of the parties, after dismissing defendants on May 1, 1995, based on March 17, 1995 orders to less than all causes of action; and taking further action on June 8, 1995 staying all discovery, ruling on Motions to Quash Depositions and for Protective Orders.

3. Does granting Summary Adjudication in face of Defendant's failure to disprove claims of fraud and deceit and Court's failure to apply principles of the equitable tolling doctrine to plaintiff's 42 U.S.C. 1983 action violate due process and equal protection of the law provided by the Fourteenth Amendment to the Constitution of the United States and principles established in Cervantes v. City of San Diego, 5 F.3d 1231 (9th Cir. 1993), American Pipe and Construction Co. v. Utah, 414 U.S. 538, 559 (1934), Donoghue v. The County of Orange, 848 F.2d 926, 929 (9th Cir. 1987).)

4. Does agreement of officers of the Court to commit a crime, acting under color of law, by altering

public records. filing a false instrument, tampering with the jury and jury verdict forms, and the act done in furtherance of that agreement to pervert or obstruct justice, or the due administration of the law constitute a crime against public justice violate substantive due process and protection of law provided by the Fourteenth Amendment of the United States Constitution and principals established in People v. Parks, 7 Cal.App.4th 883; 9 Cal.Rptr.2d 450 (June 1992) App. 94; People v. Swain (1996) 12 Cal.4th 593, 49 Cal.Rptr.2d 390, 909 P.2d 994.

5. Does the appellate court Opinion, applying the doctrine of res judicta and collateral estoppel, affirming the trial court's grant of Summary Adjudication, based on the Court's taking judicial notice of the underlying Judgment and Opinion in which those issues were not litigated, violate due process and equal protection of law provided by the Fourteenth Amendment to the United States Constitution and principles established in Cervantes v. City of San Diego, 5 F.3d 1237 (9th Cir. 1993).

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OPINION BELOW

The Opinion of the Court of Appeal, dated August 28, 1996, whose judgment is herein sought to be reviewed, is B094604, App.1, and the judgment state of court of first instance , San Luis Obispo CV 075846, App. 17, 29, 38.

The Court of Appeal denied Petition for rehearing on September 20, 1996, App. 78. Petition for review in the California Supreme Court was filed on October 4, 1996, and summarily denied on November 13, 1996, App. 75. On November 21, 1996 Gates filed Motion to Stay Remittitur, summarily denied on December 3, 1996, App. 76. Remittitur issued on Dec 12 1996, App.77. The Opinion is unpublished and is reprinted in the appendix attached to this petition.

The decision of the California Supreme Court was filed on November 13, 1996. This petition for certiorari was timely filed within ninety (90) days of that date. On February 27, 1997, this Court extended time for refilling sixty (60) days to and including April 28, 1997.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. Section 1257(a).

Gates brought the underlying case, San Luis Obispo Case No. CV-B057338, to this Court's attention in Petition for Writ of Certiorari, No. 93-101 on July 12, 1993, denied on October 4, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in these questions is the denial of due process and equal protection of the Fourteenth Amendment, App. 79.

These questions concern the character of the court amending orders previously entered and dismissal of parties

absent a change in law, when the conditions under California Code of Civil Procedure section 1008 have not been met, App. 80.

Other statutes involved are: 1) California Penal Code section 115, App. 81; 2) Penal Code sections 182 and 184, App. 82-84; 3) California Government Code sections 6200 and 6201, App. 85; 4) California Government Code section 815.3, App. 86; 5) California Code of Civil Procedure section 437c (f), App. 87-88; 6) San Luis Obispo County Local Rules of Court, 7.14, App. 89.

STATEMENT OF THE CASE

This case derived from a prior contract action, Gates v. Port San Luis Harbor District, et al., San Luis Obispo Superior Court Case No. CV-061331, Court of Appeal Opinion filed on December 9, 1992, App. 104.

The present action by which Respondents, County of San Luis Obispo, "COUNTY"; SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO, "SUPERIOR COURT"; and judges: WARREN C. CONKLIN; R. DONALD CHAPMAN; HARRY E. WOOLPERT; BARRY HAMMER; CHRISTOPHER MONEY; "NAMED JUDGES", and Respondents SINSHEIMER, SCHIEBELHUT & BAGGETT, A PROFESSIONAL CORPORATION, "SS&B"; ROBERT K. SCHIEBELHUT, ESQ. "SCHIEBELHUT"; STEVEN J. ADAMSKI, ESQ.; "ADAMSKI" and Respondent PORT SAN LUIS HARBOR DISTRICT; "DISTRICT", their employees, agents and representatives conspired in the theft of jury verdict forms from the locked evidence room to affect the jury verdict and, under color of state law, denied Gates right of a fair trial under the Fourteenth Amendment of the Constitution of the United States.

The Court of Appeal misrepresents the judgment Gates obtained in the underlying case. The trial court denied

Gates, as prevailing party in the action on the contract, all costs and attorney fees, under the contract action, which contained an attorney fee clause, making reciprocal attorney fees available to the prevailing party in the action on the contract.

The appellate court did not address all the issues on appeal in the underlying case. Likewise, the California Supreme Court, and the United States Supreme Court, summarily denied petitions for review, therefore there was no ruling on the merits as to the issues of the crime against public justice in the theft of the verdict forms and the altering of public records, nor the issue of Gates being denied a fair trial. Verdict forms constitute an "instrument" within the meaning of California Penal Code section 115, People v. Parks (1992) 7 Cal.App.4th 883, 9 Cal.Rptr.2d 450.

The presiding judge of San Luis Obispo Superior Court, WARREN C. CONKLIN; the assigned trial judge, R. DONALD CHAPMAN; and defense attorneys, SS&B; SCHIEBELHUT; and ADAMSKI conspired and did remove and switch verdict forms, out of court and off the record, from the court file and subsequently suppressed the knowledge of the unlawful theft and did not inform the District Attorney or the Grand Jury of the crime.

The "NAMED JUDGES", are not "the County defendants", as represented, were served as individual defendants but did not answer as is required by law of individual defendants. On July 3, 1995 Gates was denied a hearing on Request for Default. SS&B; SCHIEBELHUT; and ADAMSKI represented only PORT SAN LUIS HARBOR DISTRICT in the underlying case, and represented the DISTRICT and themselves in the instant case, first as "Sinsheimer Defendants" and later as "HARBOR DISTRICT DEFENDANTS', App. 22-24.

It is undisputed that the reporter's transcript of Wednesday, January 2, 1991, in Case No. 61331, confirms

that the "NAMED JUDGES' and defense attorneys knew that a crime had been committed, in the theft of verdict forms. Gates requested the trial court take judicial notice of evidence, including the transcript of the last day of trial. The trial court and appellate court denied Gates request for judicial notice.

A review of Gates' Separate Statement would confirm triable issues of fact submitted to support fraud and deceit, and other issues. The appellate court erred in granting blanket affirmation of the trial court ruling granting summary adjudication to the DISTRICT. App. 38.

The March 17, 1995 orders on which the court sustained demurrers and dismissed Respondents are invalid orders. Absent a motion before the court to amend the orders, defendants added, out of court and off the record, to orders previously entered, the Eighth Cause of Action, Fraud and Deceit, and the Tenth Cause of Action, Intentional Infliction of Emotional Distress. App. 33-34.

The trial court dismissed Respondents SLO COUNTY; SUPERIOR COURT; and "NAMED JUDGES" on May 1, 1995. Thereafter these defendants filed a motion to quash and for protective order as to noticed depositions of Coffee and Reiner. It was a clear violation of due process in preventing Gates from deposing Judge Paul Coffee and Court Administrator Larry Reiner, both who may have been actively involved in the switch of verdict forms and who in all likelihood had full knowledge of the conspiracy.

Defendants had served Notice of Entry of Judgment of Dismissal on Gates on May 31, 1995, App. 18, however, the trial court arbitrarily advanced the date of the notice to be June 8, 1995, at the hearing on defendants motion, thereby reinstated the dismissed defendants to the action so the court could rule on the improper motions filed by dismissed defendants to prevent the depositions, in violation of the discovery act, App. 19.

At this same hearing, to prevent the depositions of ADAMSKI and the District Attorney, the court granted ADAMSKI on behalf of and representing, PORT SAN LUIS HARBOR DISTRICT, leave to file a motion on shortened time for protective order and to quash service of deposition notices. App. 20, even though, on May 1, 1995, the court had dismissed ADAMSKI and his law firm, App. 32. Then on May 4, 1995 the court took further action, filed an amended order, as to SS&B; SCHIEBELHUT; and ADAMSKI, adding the Fraud and Deceit cause of action, denying Gates due process and a trial on the merits. App. 32.

ARGUMENT

FRAUD AND DECEIT

The Court of Appeal misrepresents that Gates did not allege specific facts that defendants made knowingly false representations, intending to deceive or induce justifiable reliance resulting in damages. The herein named defendants violated Penal Code section 115, App. 81, Penal Code section 182 and 184, App. 82-84 and government Code section 6200, 6201, App. 85, conspired, under color of law, in reckless disregard and indifference to the rights of Gates and acted with willful and wrongful intent to affect the jury's decision and deprive Gates of due process and a fair trial.

Gates pleaded fraud and deceit with specificity and alleged : 1) Knowingly false representation by Defendants, 2) Intent to defraud and induce reliance, 3) Justifiable reliance, 4) resulting damages, and provided the Court of Appeal specific references to her complaint. App. 128.

Gates did apprise the trial court and subsequently the Court of Appeal that the set of verdict forms she found in the court file on December 31, 1990; were not the same verdict forms given to the jury in December 28, 1990, which

included a finding as to each cause of action and a finding as to the enforceability of the exculpatory clause of the contract. Gates ,having discovered the theft and evidence of fraud, and the Court's cover-up does not negate the issue of fraud, nor the deprivation of a Constitutional right.

The fact Respondent ADAMSKI and the law firm were instructed by JUDGE CONKLIN and JUDGE CHAPMAN, out of court and off the record , between Monday, December 31, 1990 and Wednesday, January 2, 1991's deliberation, to prepare and submit a third set of jury verdict forms, for each clause of action, and ruling on the enforceability of the DISTRICT'S Exculpatory clause, is undeniable proof that there was a second set of verdict forms put into the court file after the original set was stolen. This second set had to be replaced after Gates discovered the switch, because the second set was only for one finding of compensatory damages and had cover pages from respondents SS&B, law firm which the jury foreman confirmed were not on the verdict forms on December 28, 1990 before court adjourned.

The complaint specifically alleged these herein named defendants as those persons and entities who participated as conspirators and coconspirators in the illegal acts, under color of law, in the theft of the jury verdict forms. App. 128. Contrary to the Opinion, "pleading facts in ordinary and concise language is permissible in fraud cases as in any other , and liberal construction of the pleading is as much a duty of the court in these , as other cases." 3 Witkin Cal Pro.2d (1971), pleading section 575, quoted in Lacy v. Laurentide Finance Corp. (1972) 28 CA3d 251, 258, fn.2, 104 CR 547. See also Committee on Childrens T.V. Inc. v. General Food Corp. (1983) 35 C2d 197, 216.

Under the allegations set forth in the First Amended Complaint it cannot be disputed Gates pleaded with specificity as to fraud, and even if less specific than desired,

it was sufficient to put defendants on notice of the claim against them.

The appellate Opinion states the court "discussed the broad panoply of misconduct previously asserted by Gates as to the trial court, defense counsel and the jury", in its prior decision (Case No. 61331), App. 104. Not true. The Courts did not discuss or rule on the theft of verdict forms or the conspiracy involved in the crime, nor did they rule on the issue of a fair trial.

The prior action did not involve the same causes of action nor was the issue of a fair trial, under 42 USC 1983 litigated. The court held in Mata v. City of Los Angles, 20 Cal.App. 4th 141, 24 Cal. Rptr. 2d 314, "To be the same controversy there must be a nucleus of facts on which only one claim is allowed ." In California, if the second suit is on a different cause of action, as where there are separate and distinct torts . . . there is no merger, citing Nakash v. Superior Court (1987) 196 Cal.App.3d 59, 68, 241 Cal.Rptr. 578.

In the instant, Gates second complaint filed in July 18, 1995 is not barred by res judicata or collateral estoppel. Gates' first complaint encompassed five causes of action, none of which are the basis of the causes of action in the present litigation. Thus the two lawsuits do not arise out of the same alleged factual situation and the prior judgment, App. 104, does not represent a conclusive determination on any issue in the present case.

Factual matters or legal argument of misrepresentation and conspiratorial conduct under color of law, within 42 USC 1983 could not have been presented to the trial court in Case No. 61331. The illegal acts and conspiratorial conduct were not issues litigated nor related to the subject matter or relevant to the issues within the scope of the prior action. In the first action the court had jurisdiction over the subject matter therein and the parties, but lacked jurisdiction in the fundamental sense , to act in a

particular manner or to act without the occurrence of certain procedural prerequisites over the issues subsequently presented in Gates' second action CV 075846 filed July 18, 1994. Abellleira v. District Court of Appeal 17 Cal.2d 280, 287-291, 109 P.2d 942. The August 28, 1996 Opinion , App.1, failed to address the issue of the trial court's dismissal of defendants on clearly invalid amended orders under the guise of " Clerical error", in violation of code of California Code of Civil Procedure section 1008, and dismissing Defendants SS&B; SCHIEBELHUT; and ADAMSKI, who misrepresented themselves as "Harbor District" Defendants:, to protect Respondents so they do not have to answer to the crime of fraud. App. 22.

STATUTE OF LIMITATIONS

The Court's Opinion misstates that all Gates' claims, except Fraud are barred by the one-year statute of limitations, and misstates Gates' pursuit of judicial and administrative remedies as "one at a time over many years" Gates' pursuits were in good faith and timely filed and Respondents were not prejudiced thereby.

It is long settled and established law in the State of California that a plaintiff has an obligation to exhaust other judicial and administrative remedies before an action may be maintained. Under provisions of CCP section 356, the plaintiff is not required to commence an action as described in CCP section 350, until such time as other remedies have been exhausted. Dillon v. Board of pension Commissioners (1941) 18 Cal.2d 427, 116 P2d 37; Olsen v. Sacramento (1974) 38 CAL. App.3d 958, 113, Cal Rptr. 664; Valvo v. University of Southern California (1977) 67 Cal. App.3d 887, 136 Cal Rptr. 865. See also Elkins v. Derby 12 Cal.3d 410, 115 Cal Rptr. 641, The cause of action is not deemed accrued until such time as the judicial and administrative remedies are exhausted which in the instant

was January 19, 1994. Therefore the filing requirements were equitably tolled until January 19, 1995.

Contrary to the appellate Opinion, Gates is not now claiming for the first time that she exhausted her administrative remedies on January 19, 1994. In Gates declaration, under penalty of perjury, on January 24, 1995, in her Opposition to SS&B; SCHIEBELHUT, and ADAMSKI Motion to Strike, or in the Alternative Demurrer, Gates set forth the mistake and inadvertence of typist error in making reference to the 1993 letter attached to the January 19, 1994, letter from the Grand Jury. It is clear the 1993 letter was a computer print-out not day-dated, nor signed, and the Grand Jury admits it could not confirm the 1993 letter had been timely noticed to Gates. The unsigned letter was submitted to the trial court on April 26, 1995 and to the Court of Appeal on July 15, 1996.

The Opinion states Gates' claims are barred by the statute of limitations because she did not file her original complaint until July 18, 1994. Judicial remedies were exhausted on October 4, 1993 and administrative remedies exhausted on January 19, 1994. Either date confirms that the complaint was filed within the one year statute of limitations. Therefore the original complaint was not untimely, nor was the First Amended Complaint untimely when filed with leave of court based on the same general set of facts set forth in the complaint.

Had the statute of limitations expired, which it had not, the modern rule, where amendment is sought after a statute of limitations has rum, is that the amended complaint will be deemed filed as of the date of the original complaint so long as recovery is sought in each complaint upon the same general set of facts. Frost v. Witter, 132 Cal. 421, 64 P705; Stockwell v. Mcalvay, 10 Cal2d 368, 375, 74 P2d 504; Day v. Western Loan and Building Co. 42 Cal.App.2d 226, 108 P2d 702. It is undisputed that the First Amended

Complaint App 128 is based on the same general facts asserted in the complaint and was timely filed.

The Opinion failed to express the exception that allows Gates' First Amended Complaint to relate back to the filing of the original complaint . In Optical Surplus, Inc. v. Superior Court 228 Cal App.3d 776, 778-784, 279 CalRptr. 194 (March 1991) cited by the appellate court , quoting Hazel v. Hewellet 201 Cal.App.3d 1458, 247 Cal.Rrptr. 723, the court stated the applicable exception : "it includes situation where the claimant . . . knew the name and all the facts but was unaware that the law gave him a cause of action against that the fictitious named defendants and discovered that right by reason of decisions rendered after commencement of the action. [Citations]"

At the time of filling the original complaint Gates was ignorant of the liability giving rise to a cause of action against individual judges of superior court for acts performed in the clear absence of all jurisdiction and attorneys as agents and representatives of the DISTRICT for illegal conduct beyond the legal representation of their client. The Court decision on November 28, 1994, sustained defendant's demurrer with leave to amend the complaint with instructions to add the individual Judges, previously addressed as Superior Court, and attorneys, addressed as agents and representatives of the DISTRICT.

RESPONDENTS COUNTY; SUPERIOR COURT; AND NAMED JUDGES DISMISSED ON INVALID ORDER

The trial court and Court of Appeal failed to recognize that the above-named judges are not "COUNTY' defendents, but by state law are individual defendants having been niticed and served individually. The Opinion does not address denial of due process by the trial court's refusing to set a hearing and rule on Gates' Request for Default

Judgment as to the Individual Defendants, including the NAMED JUDGES, filed on July 3, 1995.

The Opinion misstates the issues and omits the fact that the individual defendants, NAMED JUDGES; SS&B; SCHIEBELHUT; and ADAMSKI failed to answer or demur as individual defendants. The Request for Default Judgment does not constitute a nullity by virtue of individual defendants dismissal of an invalid amended order, obtained out of court and off the record, and issued in the clear absence of all jurisdiction and absent a motion for reconsideration pursuant to California Code of civil Procedure section 1008 , App.80 .

The Courts Appeal failed to address the trial court's invalid amended order entered on March 31, 1995, App. 14-16, adding the Tenth Cause of Action to the original order entered on March 17, 1995, App. 11-13, absent a change in law and a motion for reconsideration required by California Code of Civil Procedure section 1008. Orders complied and drafted by Defendants, App. 11-13 and 26-30 were submitted prior to a definitive ruling by the court. Nor did the court address dismissal of the above-named defendants, on May1, 1995, pursuant to Code of Civil Procedure section 581 (F) (2), based on the order of March 17, 1995, to less than all causes of action App. 11-13.

The Court of Appeal Opinion misrepresents and failed to address Gates' written objections placed with the court on March 29, 1995 regarding the proposed and subsequently amended orders nor dismissal based on the invalid orders.

On April 6, 1995 Gates filed Writ of Mandate / Prohibition and request for "IMMEDIATE STAY", subsequently denied on April 11, 1995. App.51 .

Further , on May 1, Gates lodged her objections with the court regarding the court's entry of judgment of dismissal in violation of statutes, Code of Civil Procedure section 1008 (c), (d), (e). App.80.

Gates requested the Court take judicial notice of the due process violations in the above procedures. The Opinion misstates that this action is a collateral attack on a prior judgment . Not so. Gates allegations were not encompassed within the judgment in the prior action. App. 99. At p.9:13-17, the Opinion misstates the issues which were actually litigated in the underlying case. The issue of deprivation of Gates' Fourteenth Amendment rights to a fair trial and the theft of jury verdict forms, from the court file, are not barred by the doctrine of res judicata. These issues were not tried or ruled on by the Courts in the prior action. Issues are actually litigated if the judgment itself indicates they have been litigated or litigation of the issues was necessary to the judgment . Mata Supra, p.141.

Factual matters or legal arguments of conspiratorial conduct under color of law , under 42 USC section 1983 could not have been presented to the trial court in Case No. 61331. The illegal acts and conspiratorial conduct was not an issue of cause of action, nor related to the subject matter or relevant to the issues within the scope of the prior action, therefore it could not have been raised. In the first action the court lacked jurisdiction in the fundamental sense to act in a particular manner or to act without the occurrence of certain procedural perquisites over the issues subsequently presented in Gates' second action. Case No. 075846, (B094604), filed July 18, 1994. Abelleira Supra p. 287-291.

The Opinion misstates Gates' allegations as to the "NAMED JUDGES." She did not claim the judges acted with bad faith and malice , but alleged the "NAMED JUDGES", the COUNTY; and SUPERIOR COURT committed a crime against public justice as coconspirators in the theft of the jury verdict forms from the court file, acting in the clear absence of all jurisdiction , and thereafter failed to investigate and disclose the illegal acts to the District Attorney and Grand Jury. The deprivation of a constitutional right occurs at the instant the illegal act is perpetrated.

Lipson v. Synder 701 F.Supp. 541, 544, fn.a, citing Labov v. Lalley 809 F2d 220 (3Cir. 1987).

The appellate court, in citing Mallett v. Superior Court (1992) 6 Cal.App. 4th 1872, 1873 and Stump v. Sparkman (1978) 435 US 354, 55L.Ed2d 331, 998 S. Ct. 1099, recognizes the authority of Bradley v. Fisher 13 Wall, at 351, 20 L.Ed. 646, wherein a judge is not immune for actions though judicial in nature when taken in the clear absence of all jurisdiction. Stump, Id. at 356-357.

The COUNTY and SUPERIOR COURT are not immune from liability . Here, the "NAMED JUDGES" are elected public officials and Gates has not failed to name the elected public officials and the public entities as co-defendants in the same action, pursuant to Gov. Code section 815.3, App.86

COURT MODIFYING ORIGINAL JUDGMENTS ALTERED THE RIGHTS OF THE PARTIES

In Calendeario, 3 Cal.3d 702, 705, 91 Cal. Rptr. 497; citing In re Wimbs (1966) 65 Cal.2d 490, 498, 55 Cal. Rptr.. 222: "An amendment that substantially modifies the original judgment or materially alters the rights of the parties may not be made by the court under its authority to correct clerical error." Any attempt by the court, under the guise of correcting clerical error to "revise its deliberately exercised judicial discretion" is not permitted.

Pursuant to California Code of Civil Procedure sections 581(f) (1) and 581(F)(2), the court entered the invalid May 1, 1995 orders, based on the March 17, 1995 orders. Respondents failed to file motions with the court to amend the March 17, 1995 orders, as required by statute. Absent a motion to amend constitutes procedural maneuvering and punishable as contempt of court. California Code of Civil Procedure section 1008 (d).

The Court's irregular proceedings was a violation of due process and California statute. Pursuant to California Code of Civil Procedure 1008,amder once entered, mandates a motion to amend before the order can be changed.

> "Section 1008 governs motions for reconsideration by the parties or the court itself . It is the exclusive means for modifying, amending or revoking an order. That limitation is expressly jurisdictional . Morite of California v. Superior Court (Grayson) (1993) Cal. App. 4th, 485, 23 Cal. Rptr.2d 666, 669. App. 90

Subsequently on March 31, 1995 and May 4th, 1995 the Court did take further action , signed and entered Amended Orders absent authority to correct a judicial discretion without a motion for reconsideration before the court. Caldelario Supra, p. 705.

SS&B; SCHIEBELHUT, ESQ.; AND ADAMSKI, ESQ.; DISMISSED ON INVALID ORDERS

The Opinion claims Gates causes of action which are not grounded in fraud are barred by the one-year statue of limitations. (See STATUTE OF LIMITATIONS argument, p.8).

On March 13, 1995 defendants submitted three proposed orders, composed and drafted by defendants, for multiple choice selection subject to the trial court judge's judicial discretion. App. 24-30. Submission was prior to the court's definitive decision and " Ruling on Submitted Matters", App.31. The Court of Appeal Opinion failed to address the trial court's invalid amended order entered on May 4, 1995, App. 33-34, absent a change in law of a motion for reconsideration, under the guise of "clerical error" in face of the court's exercise of judicial discretion .

Nor did the court address the trial court's further action on May 4, 1995 after an order of dismissal was entered May 1, 1995, App. 32. Although based on an invalid amended order defendants filed Notice of Entry of Order of Dismissal on May 26, 1995, App. 36.

Gates placed written objections with the court on March 29, 1995 regarding the three proposed orders and subsequent amended orders and dismissal based on the invalid orders . Subsequently on April 6, 1995 Gates filed Writ of Mandate/Prohibition and "Immediate Stay Requested", denied by the court on April 11, 1995. App. 51.

Further on May 1, 1995 Gates lodged her objections to the court's entering judgment of dismissal in violation of statutes, California Code of Civil Procedure section 1008 (c), (d), (e). App. 25.

The order entered on March 17, 1995 constitutes an exercise of the court's judicial discretion and specifically deleted the Eighth Cause of Action. The amended order entered on May 4, 1995, adding the Eighth Cause of Action constitutes a correction of the court's judicial discretion, which cannot be corrected by amendment, absent a motion before the court. California Code of Civil Procedure 1008. It is undisputed that the admendment in question substantially altered the rights of the parties. In re Candelario Supra, P. 105.

Respondents claim they were dismissed on May 1, 1995, however the court took further action and entered the Amended Order on May 4, 1995. Respondents can't have it both ways, be dismissed on May 1, 1995 and then have the court, after the fact , amend their order adding the Eighth Cause of Action, thereby altering the rights of the parties. The procedural irregularities in the trial court, and denial of leave to amend the complaint were a manifest abuse of discretion and under the facts presented Gates should have been granted leave to amend and the demurs denied.

The trial court violated due process rights provided by the constitution, in reaching its decision and the appellate court omitted any reference to the due process violation in how the trial court reached its decision.

The trial court erred in reaching its judgment of dismissal of these named defendants on an invalid order, and if these defendants were truly dismissed before Gates requested entry of default judgment on July 3, 1995, why did these defendants change , in their pleadings, their designation and pass themselves off as "Harbor District Defendants", on June 14, 1995 in their last ditch efforts to be dismissed. App. 22-33.

SUMMARY ADJUDICATION

After exhausting administrative remedies on January 19, 1994, Gates timely filed her claim with the DISTRICT on May 13, 1994 and within the one-year statute of limitations filed her complaint on July 18, 1994. Therefore Respondents were timely noticed , were not prejudiced and were given the opportunity afforded by statute to investigate and gather evidence in defense of the claim.

Contrary to the Opinion, Gates filed but one claim with Respondent DISTRICT therefore the cases cited in the opinion are not applicable, wherein two claims were submitted . In Gates case, there was but one claim on 5/13/94, served on the DISTRICT therefore having been timely noticed of the only claim, Respondent was not prejudiced.

It is not reasonable to frustrate the system by filing simultaneous claims and civil actions when the statute may be properly tolled for the period during which Gates pursued her administrative remedies. In Elkins Supra. the court held that the statute may be properly tolled for the period during which he pursed his compensation remedy . "Moreover, nothing in the cases forecloses a rule that the statute is tolled during the pendency of compensation proceedings; indeed , the pertinent authorities support such a rule."

In the instant, Gates cannot be faulted for pursuing justice through the appropriate forums, i.e., California Attorney General, the County Grand Jury and County District Attorney where a crime was committed against public justice and where the court, and judges with knowiedge of the illegal acts failed to report the crime to these agencies.

Not having received the Grand Jury letter dated August 1993, until January 19, 1994, Gates had no way of knowing whether the Grand Jury or District Attorney would or would not proceed on her complaint, before that date.

Contrary to the Opinion. P.11:20-24, Gates did obtain rulings on her written objections to the evidence submitted by the DISTRICT in support of its motion for summary adjudication. The court ruled on the written objections in its order filed July 12, 1995, 38, therefore Gates objections were preserved on appeal.

Further, the appellate court misstates that Gates stipulated the court could take judicial notice of evidence the DISTRICT proffered. A fair review will show that on the day of the hearing of the summary adjudication motion , May 19, 1995, Gates filed her written objections with the trial judge, as provided under California Code if Civil Procedure section 475, therefore the evidence was objected to and a ruling issued by the court and objections preserved.

Under the holding in Corwin v. Los Angles Newspaper Service Bureau, Inc . 4 C3d 842, 851-852, 94 Cal. Rptr. 785; "Summary Judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor."

"To prevail, therefore, such affidavit , must state facts establishing every element to sustain a judgment in his favor,[Citations]. Such facts 'shall be set forth with particularity' California Code of Civil Procedure section 437 c, and shall be within the personal knowledge of the affiant, the affidavit to show that the affiant, if sworn as a witness can testify competently thereto. As the court stated in House v. Lala, 180 Cal. App.2d 412, 4 Cal. Rptr. 366, "[t}o satisfy the statutory requirements of "particularity", the movant's affidavit must state all the requisite evidentiary facts and not merely the ultimate facts. [Citations] Moreover, neither conclusions nor conclusions of fact are sufficient to satisfy the statutory requirement. [Citations]' "Snider v. Snider (1962) 200 Cal. App.2d 741, 748-749, 19 Cal. Rptr. 709. " Corwin Supra, fn. 6, p.851.

In the instant, Respondents' affidavits are totally insufficient to remove the factual issues raised under

common law fraud or the deprivation of a constitutional right of due process. The declarations fail to include the required statement that it was based on "personal Knowledge ". Further, none of the alleged facts contained in the declarations show that the declarant was "competent to testify thereto." Absent a showing by respondents that there is no triable issue as to any material fact, summary judgment shall not be granted based on inferences reasonably deducted from such evidence if contradicted by other inferences or evidence which raised a triable issue as to any material fact, California Code of Civil Procedures section 437c, Bowden v. Robinson 67 Cal. App.3d 705, 719, 136 Cal. Rptr. 871. Strictly construing respondents' affidavits it is undisputed that there remains unresolved issues of fact, and the order granting defendant's summary adjudication was error, in the face of disputed facts as presented in Gates' declaration and Separate statement filed in opposition to Summary Adjudication.

PRIVACY

The privacy issue under California Constitution, Article I, section 1, was not ruled on in Case No. 61331 as the Opinion claims. Further the appellate court denied plaintiff's writ petition for review of privicy claims as untimely . Therefore neither court ruled on the issue of privacy , nor on the merits of such issue .

Respondants conceded that under California law the statute of limitations may be equitably tolled when the plaintiff has several remedies and reasonably and in good faith pursued one. The basis upon which the opinion seeks to justify the trial court and its own ruling is the argument that all Gates' privacy rights were litigated in the prior case. This argument is just another ruse by the court to deny Gates' civil right claim, in the Sixth Cause of Action. Gates' sixth cause of action, Violation of Civil Rights, under 42 USC

1983, sets forth violations of due process, equal protection of the law and her right of privacy. California has consistently applied the "primary right" theory in defining a cause of action. Under this theory, the invasion of one "primary right" gives rise to a single cause of action, even though several remedies may be available to protect the primary right. Slater v. Blackwood (1975) 5 Cal 3d 791, 795, 126 Cal. Rptr. 225.

Here, the charges of deprivation of civil rights under 42 USC 1983 is Respondents' course of conduct in denial of due process and equal protection of the law. The issue of privacy rights constituted the course of conduct resulting in violation of the Privacy Act, and the legal validity of those acts. The Court, in the prior action erred in the inconsistent ruling granting Gates' motion for protective order denying a sixth inspection of her home/vessel, only as to the DISTRICT, while at the same time, denied Gates' a protective order as to the DISTRICT'S employees and board of commissioners , that were served and were parties to the action, at the time the protective order was granted only as to the DISTRICT . Here, all parties to the action were united in interest and represented by the same counsel. The issue of privacy encompassed in the Sixth Cause of Action is an attack on the legal validity of selective enforcement , a protective order as to all defendants.

In this case, a suit under a 42 USC 1983 action is a different cause of action not involving the same controversy. Where there are separate and distinct torts the doctrine of res judicata is not applicable. Mata Supra, p. 141.

ABUSE OF DISCOVERY ACT

The Opinion omits the facts re the Court's abuse of discretion in curtailing discovery, issuing protective orders and quashing service of process. Respondents did not dispute the issues presented on appeal in re deposition discovery

abuse. The Court granting protective orders and staying discovery constituted denial of all discovery and denial of due process when a motion was not legally before the court, considering the trial court had dismissed defendants on invalid orders on May 1, 1995.

On June 5, 1995, the COUNTY; SUPERIOR COURT; and "NAMED JUDGES " filed on shortened time their first motion for protective order re deposition notice to Presiding Judge Paul Coffee and Executive Officer Larry D. Reiner, on grounds the "action is pending appeal after entry of judgment." At the hearing on motion for protective order on June 8, 1995, Judge Ballantyne arbitrarily advanced the date of notice and ruled defendants had not noticed GATES on May 31, 1995, but rather noticed her at hearing on June 8, 1995. It was jurisdictional error to change the noticed date, thereby reinstating defendants as parties to the action and reinvesting the court's jurisdiction to hear and rule on dismissed parties motion. It was clearly a violation of due process. Absent jurisdiction the court had no standing to hear and rule on motions for protective order.

Gates sought information controlled by Judge Coffee and Executive Officer Reiner, discovery which could not be obtained in a less intrusive manner. Liberty v. Superior Court 10 Cal. App. 4th 1282, 13 Cal. Rptr.2d 363 (Nov. 1992).

On June 13, 1995 the COUNTY; SUPERIOR COURT; and 'NAMED JUDGES' filed a second motion, after they were dismissed by the court on May 1, 1995. Their motion to quash and for protective order was to prevent the depositions of Respondent ADAMSKI and the District Attorney. Originally the court granted a protective order as to the D.A. but denied the motion as to ADAMSKI and thereafter amended the order absent a hearing . Respondents served, for the second time, the Notice of Entry of Judgment of Dismissal, at the hearing on June 8, 1995, however recorded in court records as having been filed on June 6,

1995. App.19. Subsequently, out of protective order, as to Respondent ADAMSKI was arbitrarily changed to grant of protective order, App. 22-23.

At the time the court granted protective orders and reinstated Respondents as parties to the action, it was not procedurally proper to require plaintiff to file a motion under California Code of Civil Procedures section 2036 when by virtue of California Code of Civil Procedures section 2025, discovery was available. A motion for discovery under section 2036 would have served no purpose. Had the trial court intended the right to discovery it would not have granted protective orders in the first instance.

At the June 8, 1995 hearing Defendant ADAMSKI moved for order, on behalf of Defendant DISTRICT to, on shortened time, file a motion to quash and for protective order. The court granted the oral motion and ruled, "Motion for Protective Order' is ordered to stand submitted this date." App. 20, and ordered all discovery to be permanently stayed and no discovery sought as to defendants except by way of California Code of Civil Procedure section 2036, App. 22-23, and further ordered that 'HARBOR DISTRICT DEFENDANTS' , including without limitation deposition of Defendant ADAMSKI be stayed pending execution of judgment of dismissal by Judge Hatch, at some future undetermined date.

On June 14, 1995 Defendant DISTRICT filed motion to quash and for protective order to prevent deposition of Defendant ADAMSKI, encompassing SS&B; and ADAMSKI, under the guise of "Collectively Harbor District Defendant", App. 22. Respondant ADAMSKI was served summons and complaint as an individual defendant. Judge Andreen signed the June 28, 1995 order on the same day it was submitted by defendants, in violation of California Rules of Court, Rule 309. App. 22-23.

PUNITIVE DAMAGES AVAILABLE UNDER 42 USC 1983

Respondants conspiratorial conduct, under color of law, violated a right secured by the constitution. These Respondents acting in reckless disregard violated that right . In Cochetti v. Desmond 572 Fed Rptr.2d 102, the court set forth the test for punitive damages against a governmental agency citing Fisher v. Voltz 496 Fed 333, 347-348 (3rd Cir 1974) holding that in civil right cases punitive damages may be awarded even without award of compensatory damages. Exemplary damages are not foreclosed unless the court denies a trial on the merits.

The opinion misstates that punitive damages are not available under 42 USC 1983. In light of the Supreme Court's decision in Maine v. Thiboutot 488 U.S. 1,, 65 L.Ed2d 555, 100 S. Ct. 2505 (1980), the section 1983 damages remedy may now be available for the violation for federal statutory as well as constitutional law. Under the expanding liability set forth in Middlesex Sewage Authority v. National Sea Clammers Assn., ante, p.1, 69 L.Ed2d 435, 101 S. Ct. 2615, municipalities and other units of the state and local government face the possibility of having to assure compensation for persons harmed by abuses of governmental authority covering a large range of activity in everyday life. Newport v. Facts Concerts, Inc. 453 U.S. 247, 69 L.Ed2d 616, 101 S. Ct. 2148.

CONCLUSION

By letter of February 5, 1997 the California Attorney General, Daniel E. Lungren, suggests GATES submit firm proof to the district attorney of any criminal conduct. App.127.

Gates respectfully submits that citizen deprived of a fair trial due to theft of jury verdict forms is a federal issue

for review by this court, The highest court in our land must address the injustice of jury tampering by court and counsel resulting in denial of a fair trial.

For the foregoing reasons, if action or inaction of the lower courts infringe upon the constitutional rights of a single citizen it is of concern to all citizens. Petitioner respectfully prays that her petition for writ of certiorari be granted. In the event the petition is granted, petitioner prays that the Judgment of the court below be reversed, that the cause be remanded, and the court be directed to grant a trial on the merits on the issues presented on appeal.

Respectfully submitted,

DATED : April 14, 1997

Eva M Gates

Petitioner, pro per.

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APPELLATE DISTRICT, DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES, Plaintiff and Appellant,

v. 2 Civil No. B094604

THE COUNTY OF SAN LUIS OBISPO, et al., Defendant and Respondent,

OPINION

(Filed August 28, 1996)

Years ago, Port San Luis Harbor District (Port) damaged Donald and Eva Gates' boat while hauling it out for routine maintenance. The Gates sued Port and many others and obtained judgment after jury trial of approximately $50,000, including costs. We affirmed the judgment, the California Supreme Court denied the Gate's petition for review and the United States Supreme Court denied their petition for certiorari.

The gist of Eva Gates' present action is that defendants stealthily conspired to improperly investigate, document and try the previous action. She asserts that defendants unlawfully took jury verdict forms from a locked evidence room and replaced them with fraudulent verdict forms. She claimed that defendants invaded her privacy by repeatedly inspecting her boat and that they denied her a fair trial.

Eva Gates appeals from the judgment of dismissal by the trial court after it ordered summary adjudication of issues in favor of respondent, Port, in the instant case. She appeals from the judgment and orders of dismissal of the trial court after it sustained the demurrer of respondents, the County of San Luis Obispo, its Superior Court and Judges R. Donald

Chapman, Warren Conklin, Barry Hammer, Christopher Money and Harry E. Woolpert (the County defendants) without leave to amend. And, she appeals from the order of the trial court dismissing her action with prejudice as to respondents, Sinsheimer, Schiebelhut & Baggett, a professional corporation, Steven J. Adamski and Robert K. Schiebelhut, attorneys who represented defendants in this matter. We affirm all the judgments and orders of the trial court from which Gates properly appealed.

FACTS

In 1986, the Gates sued Port and others for damaging their boat during its haul out for maintenance. The Gates appealed claiming inadequate damage, improper denial of costs and expenses, error in evidentiary rulings and misconduct of the trial court, counsel and the jury resulting in an unfair trial. In December 1992, we affirmed. In February 1993, the Gates filed a writ petition with this court, claiming for the first time that the Port invaded their privacy by obtaining the trial court's permission to inspect their boat before the previous trial. On March 23, 1993, we denied the petition as untimely. The Gates' petitions for review and for writ of certiorari were denied by the California and United States Supreme Courts, respectively, on March 31 and October 4, 1993.

On May 16, 1994, the Gates presented a claim to Port's Board of Harbor Commissioners. On May 26, 1994, the Board denied the claim as untimely. The Port notified Gates that they could request leave to present a late claim, but they did not seek leave to do so. Instead, Eva Gates filed the present action on July 18, 1994 against the Port, the County of San Luis Obispc and its Superior Court.

On December 19, 1994, Eva Gates filed the instant first amended complaint against the Port, the County and the Sinsheimer defendants alleging violations of her civil rights,

negligence, fraud, infliction of emotional distress, punitive damages and for tax refund.

The trial court granted Port's motion for summary adjudication of issues and dismissed the action against Port. It ruled that: 1. the state tort causes are barred because her claim was untimely; 2. the cause for deprivation of fair trial is barred by res judicata and collateral estoppel; 3. the cause for violation of privacy is barred by the statute of limitations and 4. the cause for punitive damages is barred because public entities are immune from such claims.

The trial court sustained the demurrer of the County defendants and entered judgment of dismissal in their favor because none of the causes of action state facts sufficient to constitute a cause of action against any of them and there may be no liability assessed against any of them under applicable substantive law.

The trial court similarly dismissed the Sinsheimer respondents because the statute of limitations bars each cause of action, except fraud. Several causes of action do not state facts sufficient to state a cause of action. The trial court also ruled that the Sinsheimer defendants are immune from liability. This court denied Gates' writ petition to stay proceedings and to compel the trial court to overturn the demurrers of the County and the Sinsheimer defendants.

Gates sought to depose Larry D. Reiner, the Executive Officer of the Superior Court, and Presiding Judge Paul Coffee. She sought production of documents from them, too. She sought to depose Barry T. LaBarbara, the District Attorney of the County of San Luis Obispo and Steven J. Adamski, defense counsel. The trial court granted defendant's motions to quash service of the deposition subpoenas and for protective orders. The trial court stayed all discovery. Gates did not further seek to compel discovery.

Eva Gates appeals from these orders and judgments. She also assigns as error various rulings on discovery matters and purported procedural irregularities in processing her

request to enter default and judgment as to various individual defendants.

DISCUSSION

As to Port

A motion for summary adjudication shall be granted if it completely disposes of a cause of action, a claim for damages or an issue of duty. (Code Civ. Proc., sec. 437, subd. (f) (1).) "A cause of action has no merit if either of the following exists: (1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded, (2) A defendant establishes an affirmative defense to that cause of action." (Code Civ. Proc., sec. 437, subds. (n) (1) & (2); Westlye v. Look Sports, Inc. (1993) 17 Cal.App.4th 1715, 1726-1727.) When a defendant meets the burden of showing that a cause of action has no merit or there is a complete defense thereto, the burden shifts to the plaintiff to show that a triable issue of material fact exists. The plaintiff may not rely upon the allegations of its pleadings to do so, but instead must set forth specific, admissible facts showing that a triable issue of material fact exists. (Code Civ. Proc., sec. 437c, (o) (2); Compton v. City of Santee (1993) 12 Cal.App.4th 591, 595-596.)

Causes of Action Under State Law

A public entity, such as Port, may be liable in tort only pursuant to statute. (Gov. Code, sec.815) Pursuant to Government Code sections 901, 905, 905.2 and 911.2, a plaintiff may not pursue legal action concerning personal injury or injury to personal property unless he or she files a proper written claim to the proper public officer or body within six months from the date the cause of action accures. Compliance with these claim statutes is mandatory and may

not be excused "even in the face of the public entity's actual knowledge of the circumstances surrounding the claim." (City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 454-455.)

Here, Gates alleged the conclusion that she "discovered facts giving rise to her claims against the defendants herein in August 1993." She alleged that she exhausted her administrative remedies on October 4, 1993, prior to filing her government tort claims. On May 26, 1994, Port gave Gates written notice denying her claim because it was untimely. Port notified Gates that she may request leave to present a late claim, but Gates did not do so. (Gov. Code, sec. 911.3.)

Gates now opines that she did not exhaust her administrative remedies until January 14, 1994, and that equitable tolling applies here. Gates may not assert factual allegations after entry of judgment which differ from those alleged in her complaint. (Sweat v. Hollister (1995) 37 Cal.App.4th 603, 607; 580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal.App.3d 1, 18.)

Furthermore, equitable tolling requires: "(1) timely notice to the defendant in filing the first claim, (2) lack of prejudice to defendant in gathering evidence to defend against the second claim, and (3) good faith and reasonable conduct by plaintiff in filing the second claim." (Aubry v. Goldhor (1988) 201 Cal.App.3d 399, 407, citing Addison v. State of California (1978) 21 Cal.3d 313, 319.) One must allege facts which would establish the existence of these factors. (Aubrey, supra, at p. 407.)

Gates' conclusional allegations do not establish timely notice, good faith or lack of prejudice. Although she apparently requested, as early as 1991, that the County of San Luis Obispo, its Grand Juries and the California Attorney General investigate her claim that defendants were involved in switching jury verdict forms in the previous action, she presented no evidence that she so notified Port.

(Thompson v. California Fair Plan Assn. (1990) 221 Cal.App.3d 760, 765-766.) Gates knew as of August 1993 that both the Grand Jury and the District Attorney would not proceed on her claims. Gates' state law claims are barred.

Privacy Cause of Action

In her sixth cause of action, Gates alleged that Port and the other defendants violated her right to privacy, under 42 U.S.C. section 1983, by conducting a court-ordered inspection of her boat around April 1989 as part of pretrial discovery. Claims under section 1983 are subject to a one-year statute of limitations. (Cervantes v. City of San Diego (9th Cir. 1993) 5 F.3d 1273; Del Percio v. Thornsley (9th Cir. 1989) 877 F.2d 785.) Gates presented her privacy claim before the trial court in the previous action by her motion for protective order which she filed in March 1989. In February 1993, after we had affirmed the previous judgment, Gates filed a writ petition with this court for review of the privacy claim. We denied it as untimely. Equitable tolling does not apply here. She is barred from stating a cause of action for invasion of privacy in the instant litigation.

Claim of Denial of Fair Trial

Throughout her first amended complaint, Gates asserts that Port, the judges of the San Luis Superior Court and defense counsel deprived her a fair trial. The claim is barred by the doctrine of res judicata. The doctrine of res judicata provides that "[a] final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action. . ." (California Coastal Com. v. Superior Court (1989) 210 Cal.App.3d 1488, 1498.) "The fact that a plaintiff requests a different type of relief, or even presents a different legal

theory, does not negate or lessen the binding effect of the previous state court judgment." (Id. at p. 1499; Safeco Insurance Co. v. Tholen (1981) 117 Cal.App.3d 685, 696-697.) The doctrine exists to preclude multiple suits regarding the same subject matter by preventing plaintiff from splitting causes of action, as here. In our prior decision, we discussed the broad panoply of misconduct previously asserted by Gates as to the trial court, defense counsel and the jury.

Punitive Damages

A plaintiff may not obtain punitive damages against a public entity under state law or under section 1983. (Gov. Code, sec. 818; Newport v. Fact Concerts, Inc. (1981) 453 U.S. 247, 271 [69 L.Ed.2d 616, 634-635].) Gates is precluded from seeking such damages from the Port and the County defendants here.

County Defendants

"On appeal from a judgment of dismissal entered after a demurrer has been sustained without leave to amend, unless failure to grant leave to amend was an abuse of discretion, the appellate court must affirm the judgment if it is correct on any theory. [Citations.] If there is a reasonable possibility that the defect in a complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend. [Citation.] The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended." (Hendy v. Losse (1991) 54 Cal.3d 723, 742.) Gates has not done so here. Aside from being a collateral attack on a prior judgment, Gates' action against the County defendants is barred by the statute of limitations, as well as by judicial and other immunities. The statute of limitations for personal injuries in

California is one year. (Code Civ. Proc., sec. 340, subd. (3); County of San Diego v. Sanfax. (1977) 19 Cal.3d 862, 878.) In this case, Gates alleged the conclusion that she "discovered facts giving rise to her claims against the defendants herein in August 1993." Gates did not file her original complaint against the Port, the County and the Superior Court until July 18, 1994.

The statute of limitations for deprivation of federal rights under 42 U.S.C. section 1983 is deemed to be the one-year state statue for personal injuries set forth in Code of Civil Procedure 340. Gates's allegations against the judges assert deprivation of due process under the United States Constitution and federal law regarding incidents which occurred before and during the previous action . She did not name the judges as defendants herein until December 19, 1994. The instant action is untimely as to the judges. Further more, her current allegations of an unfair trial, including tampering with jury verdict forms, are barred by the doctrine of res judicata as a collateral attack on the previous action. (See generally Forrester v. White (1988) 484 U.S. 219, 225 (98 L.Ed.2d 555,564.)

Furthermore, the judges are immune from liability in both ordinary civil actions and in actions pursuant to section 1983. (Stump v. Sparkman (1978) 435 U.S. 349, 355-356, 359-360 (55 L.Ed.2d 331, 338-339, 340-341); Mallett v. Superior Court (1992) 6 Cal.app.4th 1853, 1872-1873.) Such immunity lies even when a plaintiff alleges that the judges acted in bad faith or with malice, as, here. (Mireles v. Waco (1991) 502 U.S. 9, 11 (116 L.Ed.2d 9, 14).) The county and the superior court may not be liable for any allegations related thereto. (Gov. Code, sec.815.2, subd. (b).) accordingly, the trial court did not abuse its discretion in curtailing discovery and issuing its protective orders. (Code Civ. Proc., sec. 2025, subd. (i); Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal.3d 161,171.)

The Sinsheimer Defendants

Gate's current claims against the Sinsheimer defendants, counsel to Port and County, concern their alleged actions during pretrial and trial of the previous action. On the face of Gate's first amended complaint, all of her causes of action which are not grounded in fraud are barred by the one-year statute of limitations. (Union Carbide Corp. v. Superior Court (1984) 36 Cal.3d 15, 25.) Her current allegations as to these added defendants do not relate back to her initial, July 1994 complaint. (Optical Surplus v. Superior Court (1991) 228 Cal.App.3d 776, 783.)

In the trial court, Gates did not argue that equitable tolling extended beyond October 4, 1993. and, although she has been aware of the Sinsheimer defendants for years, she did not name them in her repeated attempts to interest the San Luis Obispo Grand Juries and the California Attorney General's offices into filing criminal charges.

Furthermore, she may not pursue different administrative and judicial remedies one at a time over many years and later claim equitable tolling of her right to sue . This is akin to splitting causes of action, which is barred by the doctrine of res judicata.

FRAUD

To plead fraud, one must allege facts showing that defendants made knowingly false representations, intending to deceive or induce justifiable reliance resulting in damages. (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 216.) Gates' assertions of fraud and deceit are bereft of sufficient allegations to survive demurrer for failure to state a cause of action.

Other Issues

The trial court had the authority to amend its order to correct the clerical error of denominating the ninth cause of action as insufficiently alleged, instead of the eighth. (In re Candelario (1970) 3 Cal.3d 702, 705.)

The trial court did not abuse its discretion in the middle of 1995 to deny discovery as to various individuals, because the instant case had been dismissed by then as to all defendants except Port. As of May 19, 1995, the trial court ruled that it was granting summary adjudication as to all remaining claims against the Port, too. Similarly, because Robert K. Schiebelhut and Steven J. Adamski had been dismissed from the instant action, Gates' requests for default judgment against them were nullities.

Port, as a public entity, is entitled to file a general denial in response to Gates' verified complaint. (Code Civ. Proc., sec. 446.) Although Gates filed written objections to the evidence submitted by Port in support of its motion for summary adjudication, she obtained no ruling on those objections. Her failure to obtain rulings on the objections constitute waiver, and her objections are not preserved for appeal. (Code Civ. Proc., sec. 437c, subd. (c); Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 670, fn. 1.) Moreover, Gates stipulated that the court take judicial notice of most of the evidence Port proffered. Such action, of course, also constitutes waiver of the objections.

All other "issues" which Gates attempts to raise here are either unintelligible, frivolous or are not before us. The name of the Gates' damaged vessel is "The Endless III." We trust that the boat's name does not portend further litigation in this matter. The orders and judgments of the trial court are affirmed. Costs to respondents.

NOT TO BE PUBLISHED STONE, P. J.

We concur: GILBERT, J. AND YEGAN, J.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

ORDER SUSTAINING DEFENDANT'S DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND

(Filed March 17, 1995)

Defendants, COUNTY OF SAN LUIS OBISPO SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO, and R. DONALD CHAPMAN, WARREN C. CONKLIN, HARRY E. WOOLPERT, BARRY HAMMER and CHRISTOPHER MONEY, employees of COUNTY OF SAN LUIS OBISPO, a public entity, (hereinafter collectively referred to as "defendant COUNTY' unless otherwise indicated) demurrer to plaintiff EVA GATES' First Amended Complaint having come before the Court for hearing on February 24, 1995, with Mr. James J. Arendt of Eldridge, Anderson & Weakley appearing on behalf of defendant COUNTY, Mr. Stephen J. Adamski appearing on behalf of defendants SINSHEIMER, SCHIEBELHUT and BAGGETT, STEPHEN J. ADAMSKI and ROBERT K. SCHIEBELHUT and plaintiff, EVA M. GATES, appearing in pro per, and the Court having considered the papers and arguments submitted in support of, and in opposition to, the demurrer and good cause appearing,

IT IS ORDERED that the demurrer as it relates to plaintiff's First Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Second Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Third Cause of Action is sustained without leave to amend on the grounds that this cause of action does state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Fourth Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Fifth Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Sixth Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Seventh Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Eighth Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Ninth Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Eleventh Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

DATED: March 17, 1995

S/ Leighton Hatch
Superior Court Judge, Assigned

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

AMENDED ORDER SUSTAINING DEFENDANT'S DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND

(Filed March 31, 1995)

Defendants, COUNTY OF SAN LUIS OBISPO SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO, and DONALD CHAPMAN, WARREN C. CONKLIN, HARRY E. WOOLPERT, BARRY HAMMER and CHRISTOPHER MONEY, employees of COUNTY OF SAN LUIS OBISPO, a public entity, (hereinafter collectively referred to as "defendant COUNTY" unless otherwise indicated) demurrer to plaintiff EVA GATES First Amended Complaint having come before the Court for hearing on February 24, 1995, with Mr. James J. Arendt of Eldridge, Anderson & Weakley appearing on behalf of defendant COUNTY. Mr. Stephen J. Adamski appearing on behalf of defendants SINSHEIMER, SCHIEBELHUT and BAGGETT, STEPHEN J. ADAMSKI and ROBERT K. SCHIEBELHUT and plaintiff, EVA GATES, appearing in pro per, and the Court having considered the papers and arguments in support of, and in opposition to, the demurrer and good cause appearing,

IT IS ORDERED that the demurrer as it relates to plaintiff's First Cause of Action is sustained without leave to

amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Second Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Third Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Fourth Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Fifth Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Sixth Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Seventh Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Eighth Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Ninth Cause of Action is sustained without leave to amend on the grounds that this action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Tenth Cause of Action is sustained without leave to amend on the grounds that this action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under applicable substantive law there can be no liability on the cause of action alleged.

Plaintiff's Eleventh Cause of Action is sustained without leave to amend on the grounds that this cause of action does not state facts sufficient to constitute a cause of action against defendant COUNTY and that under the applicable substantive law there can be no liability on the cause of action alleged.

DATED: March 31, 1995

S/Leighton Hatch
Superior Court Judge,Assigned

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS, OBISPO, et al., Defendants,

JUDGMENT OF DISMISSAL FOLLOWING SUSTAINING OF DEFENDANTS COUNTY OF SAN LUIS OBISPO, SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO, R. DONALD CHAPMAN, WARREN C. CONKLIN, HARRY E. WOOLPERT, BARRY HAMMER AND CHRISTOPHER MONEY'S DEMURRER TO PLAINTIFF EVA M. GATES' FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND [CCP SECTION 581 (F) (2)] (Filed May 1, 1995)

Pursuant to the court's order dated March 17, 1995, sustaining the demurrer of defendants COUNTY OF SAN LUIS OBISPO, SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO, R. DONALD CHAPMAN, WARREN C. CONKLIN, HARRY E. WOOLPERT, BARRY HAMMER and CHRISTOPHER MONEY, to plaintiff's first amended complaint without leave to amend,

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff's first amended complaint is dismissed with prejudice as to defendants and that judgment be entered in favor of defendants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendants shall recover from plaintiff defendants' costs of suit in accordance Code of Civil Procedure section 1032.

DATED: May 1, 1995

S/Leighton Hatch
Superior Court Judge, Assigned

PROOF OF SERVICE

NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL

BY MAIL, for Defendants COUNTY OF SAN LUIS OBISPO, SUPERIOR COURT and NAMED JUDGES,

SERVED ON: Eva M. Gates Plaintiff,

Steve J. Adamski, Esq. Defendant &
Attorney for:
PORT OF SAN LUIS HARBOR DISTRICT

EXECUTED on May 31, 1995 at Fresno, CA.

S/Sally E. King

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA. M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL

(Filed June 6, 1995)

NOTICE IS HEREBY GIVEN that on May 1, 1995, a judgment of dismissal was entered by the above-entitled court as to defendants COUNTY OF SAN LUIS OBISPO, SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO, R. DONALD CHAPMAN, WARREN C. CONKLIN, HARRY E. WOOLPERT, BARRY HAMMER and CHRISTOPHER MONEY, and that defendants shall recover from plaintiff costs of suit in accordance Code of Civil Procedure section 1032. A copy of said judgment is attached hereto as Exhibit "A" and incorporated herein as though fully set forth.

DATED: May 31, 1995

ELDRIDGE, ANDERSON & WEAKLEY
S/James D. Weakley
By: JAMES D. WEAKLEY
Attorneys for Defendants, COUNTY OF SAN LUIS OBISPO, SUPERIOR COURT, et al.,

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al, Defendants,

MINUTE ORDER
MOTION FOR PROTECTIVE ORDER
(Dated June 8, 1995)

Plaintiff is present In Pro Per. Counsel for Defendants are present as indicated.

Motion is argued.

The Court reads and considers documents submitted for review by Plaintiff and returns same to her.

Mr. Adamski moves for an order shortening time re motion to quash subpoenas of counsel and the deputy district attorney. Said motion is granted and times for service is ordered shortened to 3 days, with response due by no later than 1 day before the hearing. Hearing of motion to quash is set for Monday, June 19, 1995, at 9:00 a.m. in Department III.

Status conference of June 16, 1995, is ordered vacated.

Motion for protective order is ordered to stand submitted this date.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

Honorable Jay Ballantyne,
Superior Court Judge, Visiting

RULING ON SUBMISSION

(Minute Order, Dated: June 8, 1995)

On the matter heretofore ordered to stand submitted, the Court now rules:

Defendant's motion for a protective order to prevent taking of depositions of Larry Reiner and San Luis Obispo County Superior Court Presiding Judge Paul H. Coffee is granted.

Motion for imposition of sanctions is denied, as notice of entry of judgment of dismissal was not served on Plaintiff with the original notice of motion but was filed with the Court at hearing.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

ORDER ON MOTIONS TO QUASH SERVICE AND FOR PROTECTIVE ORDER

(Filed June 28, 1995)

On June 19, 1995, the motion of Defendants County of San Luis Obispo, Superior Court, County of San Luis Obispo, R. Donald Chapman, Warren C. Conklin, Harry E. Woolpert, Barry Hammer, and Christopher Money (collectively "the Defendants") for Protective Order and for Imposition of Sanctions and the motion of Defendants Port San Luis Harbor District, Sinsheimer, Schiebelhut & Baggett, Robert K. Schiebelhut & Steven J. Adamski (collectively "the Harbor District Defendants") to Quash Service and for Protective Order came on regularly for hearing in Division C of the above-entitled court, the Honorable Kenneth Anderson presiding. James D. Weakley of Eldridge, Anderson & Weakley appeared for the County Defendants, Thomas D. Green of Sinsheimer, Schiebelhut & Baggett appeared for the Harbor District Defendants, and Eva M. Gates, plaintiff, appeared in propria persona.

The Court, after considering all moving papers, evidence and oral arguments, orders as follows:

IT IS HEREBY ORDERED, as to the County Defendants' motion, the Court grants that motion and orders that all discovery as to those defendants be sought except by

way of the procedure set out in Code of Civil Procedure, Section 2036. Sanctions are not awarded.

IT IS FURTHER ORDERED, as to the Harbor District Defendants' motion for a protective order, the Court grants that motion and orders that all discovery relating to the Harbor District Defendants, including without limitation the deposition of Steven J. Adamski, be stayed pending execution of a judgment of dismissal of those defendants by Judge Leighton Hatch. If the judgment of dismissal is executed, all discovery as to those defendants shall be permanently stayed and no further discovery as to those defendants shall be sought except by way of the procedure set out in Code of Civil Procedure, Section 2036. If Judge Hatch reconsiders the dismissal of the Harbor District Defendants and does not execute a judgment of dismissal, then discovery as those defendants may proceed by stipulation of the parties or notice.

As to the Harbor District Defendants' motion to quash, the Court denies that motion.

DATED: June 28, 1995

S/Kenneth Andreen
Superior Court Judge, Assigned

SINSHEIMER, SCHIEBELHUT & BAGGET
A Professional Corporation
Attorneys At Law
Post Office Box 31
San Luis Obispo, California 93406-0031
(805) 541-2800

March 13, 1995

Re: Gates v. Port San Luis Harbor District et al., Superior Court Case No.075846

Honorable Leighton Hatch
County Government Center
1050 Monterey Street
San Luis Obispo, CA 93401

Dear Judge Hatch:

This firm represents Sinsheimer, Schiebelhut & Baggett, Robert K. Schiebelhut and Steven J. Adamski ("Sinsheimer Defendants"), all defendants in the above entitled action. On February 24, 1995, Judge Hatch heard the Sinsheimer Defendants' motion to strike or, in the alternative, demurrer to Plaintiff's First Amended Complaint. Judge Hatch asked that we provide you with proposed orders.

Enclosed you will find three orders. The first grants the demurrer in its entirety without leave to amend. The second permits Judge Hatch to sustain the demurrer in part by (a) striking out any paragraphs you may not agree with and (b) designating whether-as to each cause of action-the demurrer is sustained with or without leave to amend. The third order addresses our motion to strike. However, if the demurrer is sustained only in part or overruled, we request that Judge Hatch also consider the motion to strike.

I hope these proposed orders prove useful. Please let me know if we can be of any further assistance in this matter.

Sincerely yours,

SINSHEIMER, SCHIEBELHUT & BAGGETT

Signed: THOMAS D. GREEN
for STEVEN J. ADAMSKI

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

(Proposed Order #1)

ORDER RE: DEMURRER OF DEFENDANTS SINSHEIMER, SCHIEBELHUT & BAGGETT; ROBERT K. SCHIEBELHUT, AND STEVEN J. ADAMSKI, TO PLAINTIFF'S FIRST AMENDED COMPLAINT

The demurrer to the first amended complaint of Defendants Sinsheimer, Schiebelhut & Baggett, a professional corporation, Robert K. Schiebelhut and Steven J. ADAMSKI ("Sinsheimer Defendants") came on for regular hearing before this court on February 24, 1995. All parties to the action were present. After hearing, the matter was submitted to the court for a ruling.

The court, having read and considered the papers submitted by all parties, and having heard and considered the arguments of all parties, and good cause appearing therefor, IT IS HEREBY ORDERED THAT:

(1) The demurrer is GRANTED with/without leave to amend as to Plaintiff's First Cause of Action on the grounds that it is barred on its face by the applicable statute of limitations.

(3) The demurrer is GRANTED with/without leave to amend as to Plaintiff's Sixth Cause of Action on the grounds that (a) it is barred by the applicable statute of limitations

and (b) does not state facts sufficient to constitute a cause of action against the Sinsheimer Defendants as a matter of law.

(4) The demurrer is GRANTED with/without leave to amend as to Plaintiff's Eighth Cause of Action on the ground that it does not state facts sufficient to constitute a cause of action against the Sinsheimer Defendants as a matter of law.

(5) The demurrer is GRANTED with/without leave to amend as to Plaintiff's Ninth Cause of Action on the ground it is barred by the applicable statute of limitations.

(6) The demurrer is GRANTED with/without leave to amend as to Plaintiff's Tenth Cause of Action on the ground that it is barred by the applicable statute of limitations.

(7) The demurrer is GRANTED with/without leave to amend as to Plaintiff's Eleventh Cause of Action on the grounds that (a) it is barred by the applicable statute of limitations and (b) does not state facts sufficient to constitute a cause of action against the Sinsheimer Defendants as a matter of law.

To the extent that any portion of the demurrer is granted with leave to amend, Plaintiff shall have twenty days from the date of this order in which to serve and filed an amended complaint.

To the extent that any portion of the demurrer is not set forth as granted, it is hereby ORDERED OVERRULED.

DATED: March ____, 1995

_____

Honorable Leighton Hatch
Superior Court Judge, Assigned

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

[Proposed Order #2]

ORDER GRANTING MOTION TO STRIKE OF DEFENDANTS SINSHEIMER, SCHIEBELHUT & BAGGET; ROBERT K. SCHIEBELHUT; AND STEVEN J. ADAMSKI TO PLAINTIFF'S FIRST AMENDED COMPLAINT

The motion to strike of Defendants Sinsheimer, Schiebelhut & Baggett, a professional corporation, Robert K. Schiebelhut and Steven J. Adamski ("Sinsheimer Defendants") came on for regular hearing before this court on February 24, 1995. All parties to the action were present. After hearing, the matter was submitted to the court for a ruling.

The court, having read and considered the papers submitted by all parties, and having heard and considered the papers submitted by all parties, and having heard and considered the argument of all parties, and good cause appearing therefor,

IT IS ORDERED that the motion be, and is hereby, GRANTED, and that the First Amended Complaint be, and hereby is, stricken as to each of the Sinsheimer Defendants.

Dated: _____, 1995

_____
Honorable Leighton Hatch
Superior Court Judge, Assigned

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

[Proposed Order #3]

ORDER RE: DEMURRER OF DEFENDANTS SINSHEIMER, SCHIEBELHUT & BAGGETT, ROBERT K. SCHIEBELHUT, AND STEVEN J. ADAMSKI, TO PLAINTIFF'S FIRST AMENDED COMPLAINT

[Filed March 17, 1995]

The demurrer to the first amended complaint of Defendants Sinsheimer, Schiebelhut & Baggett, a professional corporation, Robert K. Adamski ("Sinsheimer Defendants") came on for regular hearing before this court on February 24, 1995. All parties to the action were present. After hearing, the matter was submitted to the court for a ruling.

The court, having read and considered the papers submitted by all parties, and having heard and considered the argument of all parties, and good cause appearing therefor,

IT IS ORDERED that the demurrer be, and hereby is, sustained in its entirety without leave to amend on the following grounds:

(1) each cause of action alleged against the Sinsheimer Defendants- -except the Eighth Cause of Action- -is barred on its face by the applicable statute of limitations,

(2) the second, sixth and ninth causes of action do not state facts sufficient to state a cause of action against the Sinsheimer Defendants; and

(3) the Sinsheimer Defendants are immune from liability under 42 U.S.C. Section 1983.

Dated: March 17, 1995

S/Honorable Leighton Hatch
Superior Court Judge, Assigned

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

Honorable Leighton Hatch
Superior Court Judge, Assigned

Proceedings: 1) Ruling on Submitted Matters
2) Demurrer of Sinsheimer, Schiebelhut & Baggett
3) Motion to Strike

[Minute Order, Dated: March 17, 1995]

The Court having submitted the above matters pending submission of proposed orders by Mrs. Gates and counsel and said proposed orders having been submitted the Court now grants and signs the following:

1) Order Sustaining Defendants' Demurrer to Plaintiff's First Amended Complaint Without Leave to Amend submitted on behalf of the County of San Luis Obispo, Superior Court, County of San Luis Obispo, R. Donald Chapman, Warren C. Conklin, Harry E. Woolpert, Barry Hammer and Christopher Money.

2) Order Re: Demurrer of Defendants Sinsheimer, Schiebelhut & Baggett, Robert K. Schiebelhut and Steven J. Adamski to Plaintiff's First Amended Complaint sustaining Defendants demurrer without leave to amend.

Defendant's motion to strike is moot.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants

ORDER OF DISMISSAL

[Filed May 1, 1995]

Good cause appearing therefor, IT IS ORDERED THAT, pursuant to the provisions of Section 581(f)(1) of the Code of Civil Procedure, the above-entitled action be, and hereby is, DISMISSED with prejudice as to the following defendants: Defendant Sinsheimer, Schiebelhut & Baggett, a professional corporation; Defendant Steven J. Adamski; and Defendant Robert K. Schiebelhut.

S/ Honorable Leighton Hatch
Superior Court Judge, Assigned

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

AMENDED ORDER RE: DEMURRER OF DEFENDANTS SINSHEIMER, SCHIEBELHUT AND BAGGETT; ROBERT K. SCHIEBELHUT; AND STEVEN J. ADAMSKI TO PLAINTIFF'S FIRST AMENDED COMPLAINT
[Filed May 4, 1995]

The demurrer to the first amended complaint of Defendants Sinsheimer, Schiebelhut & Baggett, a professional corporation, Robert K. Schiebelhut and Steven J. Adamski ("Sinsheimer Defendants") came on for regular hearing before this court on February 24, 1995. All parties to the action were present. After hearing, the matter was submitted to the court for a ruling.

The court, having read and considered the papers submitted by all parties, and having heard and considered the argument of all parties, and good cause appearing thereof,

IT IS ORDERED that the demurrer be, and hereby is, sustained in its entirety without leave to amend on the following grounds:

(1) each cause of action alleged against the Sinsheimer Defendants- -except the Eighth Cause of Action- -is barred on its face by the applicable statute of limitations;

(2) the second, sixth and eighth cause of action do not state facts sufficient to state a cause of action against the Sinsheimer Defendants; and

(3) the Sinsheimer Defendants are immune from liability under 42 U.S.C. Section 1983.

Dated: May 4, 1995

S/ Honorable Leighton Hatch
Superior Court Judge, Assigned

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

Honorable Leighton Hatch
Superior Court Judge, Assigned

Proceedings: Motion For Summary Adjudication

[Minute Order, Dated: May 19, 1995]

Plaintiff is present In Pro Per. Counsel for defendant Port San Luis Harbor District is present.

Plaintiff and counsel for Defendant present argument to the Court.

Defendant's motion for summary adjudication is granted as prayed for reasons stated on the record in open court.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

NOTICE OF ENTRY OF ORDER OF DISMISSAL

[Filed May 26, 1995]

PLEASE TAKE NOTICE that an Order of Dismissal in the form attached hereto as Exhibit "A" was entered by the above-entitled court on May 1, 1995.

Dated: May 26, 1995 SINSHEIMER, SCHIEBELHUT & BAGGETT

S/ STEVEN J. ADAMSKI
Attorneys for Defendants
Sinsheimer, Schiebelhut & Baggett, Steven J. Adamski, Robert K. Schiebelhut

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

Hon. Leighton Hatch, Assigned

Proceedings: HEARING ON OBJECTIONS TO PROPOSED ORDER AND JUDGMENT RE SUMMARY ADJUDICATION

[Minute Order, Dated: July 12, 1995]

Plaintiff Eva Gates is present In Pro Per. Defendant Port San Luis Harbor District is represented by counsel Steven Adamski.

Plaintiff Eva Gates states her objections to the purposed order and judgment on the record in open court.

Court states it will sign the purposed order and judgment as submitted this date.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

ORDER GRANTING SUMMARY ADJUDICATION IN FAVOR OF SAN LUIS HARBOR DISTRICT AS TO ALL CLAIMS ASSERTED BY PLAINTIFF AGAINST PORT OF SAN LUIS OBISPO HARBOR DISTRICT

[Filed July 12, 1995]

The motion of Defendant Port San Luis Harbor District ("Port') for summary adjudication came on regularly for hearing before this Court, the Honorable Leighton Hatch, Judge presiding by special assignment on May 19, 1995. Plaintiff Eva M. Gates appeared on her own behalf. Steven J. Adamski appeared for the Port.

After full consideration of the evidence, the separate statements submitted by each party, the authorities submitted by counsel, and the oral argument of counsel, the Court rules as follows:

(1) The Port's Request for Judicial Notice is GRANTED in full. At oral argument Plaintiff waived any objection she may have had to granting judicial notice of these documents.

(2) Each of Plaintiff's written objections to the evidence by the Port is overruled. Plaintiff's objections address the interpretation and background of each document submitted by the Port, not its admissibility into evidence.

(3) There is no triable issue of material fact as to any cause of action asserted by Plaintiff against the Port, and all such causes of action should be and are summarily adjudicated in favor of the Port for the following reasons:

A. Plaintiff's state law claims.

Each state law claim asserted by Plaintiff against the Port is barred because Plaintiff failed to file a timely claim with the Port pursuant to the Tort Claims Act, California Government Code Section 950, et seq.

Tort liability of a governmental entity is conditioned on the plaintiff either complying with or being excused from compliance with the claims procedures set forth under the Tort Claims Act. Government Code Sections 905, 905.2. In cases such as this, the time for filing a claim is six months from the date the cause of action occurred. Id., at Sections 901, 911.2. Plaintiff fails to plead any facts that would excuse her from compliance with these filing requirements.

Here, the evidence is undisputed that all of Plaintiff's claims concern conduct occurring in or before January 1991 (Port's Ex. E.); that Plaintiff did not file a claim with the Port addressing these matters until May 16, 1993 (Port's Ex. C, Decl. of John K. Elder, Par. 2.); that the claim was returned to Plaintiff by the Port as untimely on May 26, 1994 (Port Ex. D; Elder Decl. Par. 3); and that Plaintiff never sought leave to file a late claim (Elder Decl. para. 4).

Plaintiff argues that the Port had actual notice of her claim, citing, among other things, certain filings in the prior action and various letters. (See, e.g., Plaintiff's Exs. J, L and N.) However, compliance with the filing requirements of the Torts Claim Act is mandatory, "even in the fact of the public entity's actual knowledge of the circumstances surrounding the claim." San Jose v. Superior Court (1974) 12 Cal.3d 447, 455.

Plaintiff argues that her claims were equitably tolled while she pursued other remedies. However, Plaintiff's own admission in her verified pleadings established that the time

for filing her claim with the Port began to run no later than October 4, 1993, the date the United States Supreme Court denied Plaintiff's petition. (First Amended Complaint, p. 4; Port Ex. M.)

Plaintiff argues that her claims were equitably tolled until January 19, 1994 when she last communicated with the San Luis Obispo Grand Jury. (Plaintiff's Ex. G.) This argument is not properly before the Court because Plaintiff did not raise it in her First Amended Complaint. Moreover, Plaintiff repeated efforts to interest the Grand Jury in her matter did not and could not equitably toll the time in which to file a claim with the Port beyond October 4, 1993. (See, e.g., Id.) Plaintiff produces no admissible evidence to the contrary.

Without citation to any admissible evidence, Plaintiff argues that she was excused from filing a claim because in 1984, the Port allegedly failed to file a Roster of Public Agencies document. This issue is not properly before the Court, was adversely decided against Plaintiff in the prior related action and appeal. (See, e.g., Port Ex. J, pp. 56-57), and is irrelevant to the question of whether Plaintiff was obligated to comply with the Torts Claim Act in 1994.

Plaintiff was obligated to file a claim. The claim she filed was untimely. The Port properly rejected the claim as untimely. Plaintiff did not and cannot seek leave to file a late claim. Based on the undisputed facts, the Court finds that all of Plaintiff's state law claims against the Port are time barred including those asserted in Plaintiff's First, Third, Fourth, Eighth, Ninth and Tenth Causes of Action.

B. Plaintiff's Fair Trial Claim.

Plaintiff's Second Cause of Action asserts a claim under 42 U.S.C. Section 1983 that the Port and others acted to deprive Plaintiff of her rights to a fair trial. The Port properly asserts that this claim is barred by res judicata and collateral estoppel.

On March 19, 1991, Plaintiff filed an appeal in the prior action (Port Ex. F.) It is undisputed that Plaintiff presented her unfair trial claim to the California Court of Appeal for the Second Appellate Division. (See e.g., Port E's. H, pp. 9, 11, 16, 34-49; I, p. 23; see Plaintiff's Separate Statement opposing Defendant Port San Luis Harbor District's Motion for Summary Adjudication, p. 3, Response to Undisputed Fact No. 10.)

Plaintiff argues that the Court of Appeal did not address her unfair claim, citing the Court of Appeal's written decision and her Request for Rehearing. (Plaintiff's Exs. J and N.) However, a review of the record establishes that the Court of Appeal actually or necessarily determined whether Plaintiff received a fair trial. (Port Ex. J.) In its thirty page opinion, the Appellate Court addressed and resolved the substantive merits raised by Plaintiff's appeal including whether (1) the damages awarded were adequate; (2) the trial court erred in denying Plaintiff certain costs and fees; (3) the trial court committed prejudicial error in various evidentiary rulings; and (4) the trial court, counsel and members of the jury engaged in prejudicial conduct. The court rejected each of these claims. (Port Ex. J, pp. 2-20.) The Court of Appeal decided this matter on the merits. By necessity, this included a finding that Plaintiff received a fair trial.

Plaintiff cannot have it both ways. She cannot argue that her Section 1983 claim was equitably tolled while she pursued her appeal and then argue that the resulting adverse decision is not binding. Plaintiff's unfair trial claim was actually or necessarily heard and resolved by the Appellate Court. Plaintiff presents no evidence to the contrary. Accordingly, based on the undisputed facts, the Court finds that Plaintiff's Second Cause of Action is barred as against the Port.

C. Plaintiff's Privacy Claims.

Plaintiff's Sixth Cause of Action asserts a claim under 42 U.S.C. Section 1983 that the Port and others violated Plaintiff's Constitutional right of privacy during discovery that occurred during the prior action.

In California, a one year statute of limitations controls claims under Section 1983. Del Percio v. Thornsley (9th Cir. 1989) 877 F.2d 785. It is undisputed that the acts Plaintiff complains about concerning her rights of privacy occurred before January 1991 when the court entered judgment in the prior action. (Port's Exs. C, p. 4, para. e and Ex. N; Plaintiff's Exs. H, Plaintiff's Decl. Para. 12.)

Without "equitable tolling" this action would be time barred. Equitable tolling occurs, if at all, only when, among other things, party "reasonably and in good faith" seeks a different remedy for the same wrong. Addison v. State (1978) 31 Cal.3d 313, 319. Here, there is no evidence that Plaintiff, "reasonably and in good faith" timely sought a legally cognizably different remedy for this alleged invasion of privacy. There is no evidence that Plaintiff sought to have the issue heart by the Appellate Court by a prejudgement writ. Plaintiff did not raise the issue as part of her original appeal in the prior action. (Port Exs. F, G, H, I.) Plaintiff did not address her privacy claim to the Appellate Court in a writ dated February 10, 1993. (Port Ex. N.) The court denied this writ as untimely on February 23, 1993. (Port Ex. O.) By the time Plaintiff filed this writ, the one year limitation period had already expired on Plaintiff's Section 1983 claim. Moreover, Plaintiff did not file her claim with the Port until May 26, 1994, more than one year after the Court of Appeal denied her writ.

Plaintiff argues that she raised the issue of privacy with the trial court. (Plaintiff's Exs. D, I and J; Plaintiff's Decl. Para. 12.) This does not support a claim for equitable tolling since, among other reasons, all such efforts ceased prior to January 1991. (Id.) Plaintiff submits no evidence

contradicting the Port's showing that this claim is time-barred. Accordingly, based on the undisputed facts, the Court summarily adjudicates Plaintiff's Sixth Cause of Action in favor of the Port.

D. Plaintiff's Punitive Damage Claim.

A public entity like the Port is immune from punitive damages, including claims under Section 1983. Government Code Section 818; City of Newport v. Fact Concerts, Inc. (1981) 453 U.S. 247. Moreover, as set forth above, Plaintiff is unable to assert any claim against the Port that would provide the basis for an award of any damages. Accordingly, based on the undisputed facts, the Court summarily adjudicates Plaintiff's Eleventh Cause of Action in favor of the Port.

(4) Based on the foregoing, it is further ordered that judgment be entered in favor of the Port and against Plaintiff.

IT IS SO ORDERED

Dated: July 12, 1995

S/Honorable Leighton Hatch
Superior Court Judge, Assigned

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

JUDGMENT

[Filed July 12, 1995]

On May 19, 1995, the court granted the motion of Defendant Port San Luis Harbor District made under Code of Civil Procedure Section 437c on the ground that the action has no merit and that judgment should be entered in favor of Defendant Port San Luis Harbor District and against Plaintiff Eva Gates. In accordance with the court's ruling in this matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendant Port San Luis Harbor District and against Plaintiff Eva M. Gates and that Defendant Port San Luis Harbor District shall be entitled to its costs.

Dated: July 12, 1995

S/Honorable Leighton Hatch
Superior Court Judge, Assigned

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

NOTICE OF ENTRY OF ORDER GRANTING SUMMARY ADJUDICATION

[Filed July 19, 1995]

PLEASE TAKE NOTICE that an Order granting Summary Adjudication in the form attached hereto as Exhibit "A" was entered by the above-entitled court on July 12, 1995, with an erroneous Proof of Service dated June 14, 1995.

Dated: July 19, 1995

S/EVA M. GATES, Plaintiff, pro per.

SUPERIOR COURT
SAN LUIS OBISPO COUNTY, CALIFORNIA

EVA M. GATES Plaintiff,

v. CASE NO. CV 075846

"THE COUNTY OF SAN
LUIS OBISPO, ET AL., Defendants.

NOTICE OF ENTRY OF JUDGMENT

[Filed July 19, 1995]

Please take notice that a judgment in the form attached hereto as Exhibit "A" was entered by the above-entitled court on July 12, 1995; with an erroneous Proof of Service dated June 14, 1995.

Dated July 19, 1995 s/ EVA M. GATES, Plaintiff, pro per.

SECOND APPELLATE DISTRICT, DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES, Petitioner,

v. Case No. CV-075846

SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO, Respondent,

THE COUNTY OF SAN LUIS OBISPO, et. al., Real Parties in Interest.

PETITION FOR WRIT OF MANDATE AND PROHIBITION; "IMMEDIATE STAY REQUESTED"

[Filed April 6, 1995]

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2 CIVIL
San Luis Obispo No. 075845

SECOND APPELLATE DISTRICT, DIVISION SIX
STATE OF CALIFORNIA

EVA M. GATES, Petitioner,

v.

SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO, Respondent,

THE COUNTY OF SAN LUIS OBISPO; SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO; PORT SAN LUIS HARBOR DISTRICT; SINSHEIMER, SCHIEBELHUT & BAGGETT, A PROFESSIONAL CORPORATION; STEVEN J. ADAMSKI; ROBERT K. SCHIEBELHUT; JUDGES: WARREN C. CONKLIN; R. DONALD CHAPMAN; HARRY E. WOOLPERT; BARRY HAMMER; AND CHRISTOPHER MONEY; and Does 1 through 10, inclusive,

Real Parties in Interest,

PETITION FOR WRIT OF MANDATE AND PROHIBITION; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; HEARING TRANSCRIPTS EXHIBITS A-W

"IMMEDIATE STAY REQUESTED"
[CCP SECTIONS 1085, 1086, 1102, CRC, RULES 56, 49.5]

TO THE HONORABLE STEVEN STONE, PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA:

This court should issue the appropriate writ of mandate and writ of prohibition justified by the allegations of the petition.

Petitioner alleges:

1. Petitioner is EVA M. GATES, plaintiff in the above-entitled action, appearing in propria persona.

2. Respondent is Superior Court, San Luis Obispo County, [LEIGHTON HATCH, Judge assigned].

3. Real Parties in Interest are "THE COUNTY OF SAN LUIS OBISPO"; SUPERIOR COURT, COUNTY OF SAN LUIS OBISPO; PORT SAN LUIS HARBOR DISTRICT; SINSHEIMER, SCHIEBELHUT & BAGGETT, A PROFESSIONAL CORPORATION; ROBERT K. SCHIEBELHUT; and STEVEN J. ADAMSKI, of the above named law firm; JUDGES: WARREN C. CONKLIN; R. DONALD CHAPMAN; HARRY E. WOOLPERT; BARRY HAMMER; and CHRISTOPHER MONEY; and Does 1 through 10, inclusive.

4. Petitioner seeks a writ of mandate to vacate the lower court's rulings: 1) Sustaining Defendants' "Demurrer to Plaintiff's First Amended Complaint Without Leave to Amend, as to Defendants County, Superior Court and Judges, as listed above. Copy filed separately herewith attached to Defendants' "Proposed Amended Order" and Plaintiff's Objection, Exhibit "A" and incorporated herein by reference, said order threatens judicial action to enforce judgment of dismissal of these named defendants; and 2) Sustaining Defendants' Demurrer to Plaintiff's First Amended Complaint Without Leave to Amend, as to Defendants Sinsheimer, Schiebelhut & Baggett, a Professional Corporation; Robert K. Schiebelhut; and Steven

J. Adamski. Copy filed separately herewith as Exhibit "B" and incorporated herein by reference, that threatens judicial action to enforce a judgment of dismissal of these named defendants. These rulings depriving petitioner of the opportunity to plead her causes of action and will cause needless and expensive trial against those defendants who have not demurred.

Petitioner filed Objection to Court's Ruling on Submitted Matters, Directs Court's Attention to Failure to State Grounds for Sustaining Demurrers Without Leave to Amend, filed on March 29, 1995. Copy filed separately herewith as Exhibit "C" and incorporated herein by reference.

5. Petitioner is a person beneficially interested in the issuance of the writs by virtue of fact she is the plaintiff in the above-entitled action pending before the Superior Court, County of San Luis Obispo, and the Court's Executive Officer and Defendants' acts/or omissions to act deny petitioner the right to try her causes of action and violates petitioner's constitutional and civil rights.

6. Petitioner has performed all conditions precedent to the filing of this petition by: 1) filing summons and complaint on "The County of San Luis Obispo"; Superior Court, County of San Luis Obispo; Port San Luis Harbor District and Does 1 through 10. Copy attached hereto as Exhibit "D" and incorporated herein by reference; 2) opposed real parties in interest, San Luis Obispo County and Superior Court's Motion to Strike, copy filed separately herewith as Exhibit "E" and incorporated herein by reference; 3) opposed real parties in interest County and Superior Court's Demurrer, a copy filed separately herewith as Exhibit "F" and incorporated herein by reference; 4) filed First Amended Complaint after court's ruling on November 28, 1994. Copy of Hearing Transcript filed separately herewith as Exhibit "G" and incorporated herein by reference. Copy of First Amended Complaint filed separately

herewith as Exhibit "H" and incorporated herein by reference; 5) served summons and complaint on the law firm of Sinsheimer, Schiebelhut & Baggett, A Professional Corporation; Steven J. Adamski; and Robert K. Schiebelhut; and served and complaint on Judges: Warren C. Conklin; R. Donald Chapman; Harry E. Woolpert; Barry Hammer; and Christopher Money, copies filed separately herewith as Exhibit "I" and incorporated herein by reference; 6) addressed arbitrary tax increase on home/vessel with the County Tax Assessor and Evelyn Delancy, Supervisor, Dist. 3, County Board of Supervisors. Copy filed separately herewith as Exhibit "J" and incorporated herein by reference; 7) opposed defendants Sinsheimer Schiebelhut & Baggett, A Professional Corporation; Robert K. Schiebelhut; and Steven J. Adamski's Motion to Strike, and in the Alternative, Demurrer to Plaintiff's First Amended Complaint. Copy filed herewith as Exhibit "K" and incorporated herein by reference; 8) opposed County of San Luis Obispo; Superior Court and Judges: Warren C. Conklin; R. Donald Chapman; Harry E. Woolpert; Barry Hammer; and Christopher Money's Demurrer to Plaintiff's First Amended Complaint. Copy filed separately herewith as Exhibit "L" and incorporated herein by reference; 9) prepared, submitted and served proposed orders as instructed by the lower court, prior to a ruling and without directions of the assigned judge. Copy filed separately herewith as Exhibit "M" and incorporated herein by reference, Re: Defendant County, Superior Court and Judges' Demurrer to Plaintiff's First Amended Complaint; 10) prepared, submitted and served proposed orders, same as above, as instructed by the assigned judge, Re: Sinsheimer, Schiebelhut & Baggetts, A Professional Corporation; Robert K. Schiebelhut; and Steven J. Adamski's Motion to Strike, and in the Alternative, Demurrer. Copy filed separately herewith as Exhibit "N" and incorporated herein by reference. 11) circulated, pursuant to Local Rules of Court,

9.17, the Joint-At-Issue after Court refused to exempt the case from Fast Track. Copy of Joint-At-Issue filed separately herewith as Exhibit "P" and incorporated herein by reference; 12) Corresponded with Larry Reiner, Executive Officer of the Superior Court Re: Fast Track and Joint-At-Issue, after all judges of Superior Court disqualified themselves and the Court failed to timely set defendants' hearings on demurrers and motions to strike, which were not set until after deadline for circulating the Joint At-Issue Memorandum. Copies of letters addressing the matters, filed separately herewith as Exhibit "O" and incorporated herein by references; 13) Larry Reiner, Executive Officer, served on plaintiff "Order to Show Cause for Non-Compliance and for sanction, to appear on April 14, 1995. Copy filed separately herein by reference.

7. Petitioner is seeking a writ of mandate for the Superior Court to vacate its orders sustaining the demurrers without leave to amend and issue new and different orders allowing plaintiff to file a second amended complaint. Further, petitioner is seeking a writ of mandate to compel the lower court to issue its own statement of reasons rather than relying on defense counsel's personal interpretation based on self-serving and biased statements of grounds submitted by defense counsel . A writ of prohibition, "IMMEDIATE STAY REQUESTED" is necessary to arrest action by the lower court that is in excess of its jurisdiction. The Superior Court exceeded its jurisdiction in its failure to perform its duty and render a decision of its own evaluations of plaintiff's pleadings rather than delegating authority to counsel to submit their own biased and prejudicial orders prior to a ruling or directions from the Court.

8. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law to protect her constitutional rights of privacy, due process, equal protection of law and a fair trial, from violation of her civil rights,

violation of her legal rights, misrepresentation conspiracy, fraud and deceit of defendants.

9) Respondent's acts in excess of their jurisdiction has damaged petitioner in the sum of $1581.00.

WHEREFORE, petitioner prays,

1) That a writ issue under the seal of the Court commanding Respondent to vacate its Orders Sustaining both groups of defendant's Demurrers to Plaintiff's First Amended Complaint Without Leave to Amend;

2) Issue an " IMMEDIATE STAY " of all proceedings: (a) the lower court's dismissing defendants, (b) the lower Court's amending defendant County of San Luis Obispo; Superior Court, County of San Luis Obispo; and Judges: Warren C. Conklin; R. Donald Chapman; Harry E. Woolpert; Barry Hammer: and Christopher Money's proposed amended order; (c) the lower Court's dismissing the case for noncompliance with local rules of court 9.17, Fast Track, or (d) dismissal as a matter of course due to sustaining defendant's demurrers.

3) For recovery of costs incurred in this proceeding and for such other and further relief as the Court deems proper, by way of writ of mandate or prohibition.

DATED: April 6, 1995

EVA M. GATES, Petitioner,
propria persona.

FACTUAL BACKGROUND

The issues her arise from a previous civil action in contract, Case No. CV 61331, Gates v. port San Luis Harbor District; the District's Board of Commission members; its Chief Executive Officer ; and five employees, who damaged plaintiff's sailboat, which has been the primary residence of plaintiff and her husband since 1974. The case was tried before a jury with retired Superior Court Judge R. Donald Chapman presiding, commencing on December 3, 1990 and continuing though December 7, 1990, and reconvening at 1:00 p.m. on December 26,1990 through December 28, 1990,at which time the jury requested deliberation be postponed until January 2, 1991, even though the trial judge had read the jury instructions to the jury and instructed as to the verdict forms, including questions as to each cause of action. Due to unavailability of the assigned judge, the case suffered two breaks, one for 18 days, and a second for 4 days, after which the jury instructions were not reread to the jury. Even though plaintiffs were prevailing parties, the court denied costs which plaintiff were entitled to by law.

The irregularities, omissions to act, misconduct of court and counsel, and erroneous rulings, as set forth in plaintiff's complaint , denied plaintiff a fair trial, due process and equal protection of the law.

After pursuing alternate legal remedies, which were finalized with the court's on October 4, 1993, and after pursuing alternate and legal remedies with the District Attorney and Grand Jury, which were finalized January 14, 1994, plaintiff filed her complaint on July 18, 1994.

In response, the law firm, Sinsheimer, Schiebelhut & Baggett, still serving as legal counsel for Port San Luis Harbor District, and the other defendants in Case No. 61331, answered the verified complaint and plaintiff's First Amended Complaint, for the District only, both answers signed by attorney Defendant Steven J. Adamski.

On August 16, 1994, the County of San Luis Obispo and Superior Court, County if San Luis Obispo, filed Demurrer to Plaintiff's Complaint and Motion to Strike Portions of Plaintiff's Complaint, which was heard by [illegible] Judge, Jay Ballantyne, on November 28, 1994. The Court ruled plaintiff could amend her complaint, which must be set forth in specificity and particularity. The Court sustained, with leave to amend, the general and special demurrer and sustained, the demurrer without leave to amend the claim for punitive damages, as against a public entity.

On December 19, 1994, plaintiff filed her verified First Amended Complaint, naming (1) the law firm, Sinsheimer, Schiebelhut, & Baggett, A Professional Corporation; (2) Robert K. Schiebelhut; and (3) Steven J. Adamski, in lieu of " agents and representatives of Port San Luis Harbor District," alleging conspiratorial conduct and illegal acts as set forth in the verified Complaint, as agents and/or representatives; and also naming Judges: Warren C. Conklin; R. Donald Chapman; Harry E. Woolpert; Barry Hammer and Christopher Money pursuant to the Court's instructions that plaintiff amend her complaint in specificity and particularity.

On January 11, 1995, defendants Sinsheimer, Schiebelhut & Baggett, A Professional Corporation; Steven J. Adamski; and Robert K. Schiebelhut, served separately , but demurring collectively, filed Motion to Strike, and in the Alternative Demurrer, to Plaintiff's First Amended Complaint, seeking a defense under (1) CCP Section 1714.10, which in unavailable to these defendants due to their conspiracy with the Court, out of court and off the record, constituting acts beyond the performance of a professional duty to serve their clients; (2) under statute of limitations - except for petitioner's Eighth Cause of Action, Fraud and Deceit; (3) claim petitioner's Second, Sixth, and Ninth Cause of action, did not state facts sufficient to state a

cause of action against these moving defendants; (4) 42 USC 1983, claiming to be "government attorneys".

On January 20, 1995, defendants County of San Luis Obispo; Superior Court, County of San Luis Obispo; and Judges: Warren C. Conklin; R. Donald Chapman; Harry E. Woolpert; Barry Hammer; and Christopher Money; served separately, but demurred collectively, filing Demurrer to Plaintiff's First Amended Complaint, seeking a defense based on their claim petitioner does not state facts sufficient to constitute a cause of action against these moving defendants as to Petitioner's First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth causes of action ; plus claiming as to the First Cause of Action: "Judicial Immunity"; as to the Second Cause of Action: "State Courts not liable under 42 USC 1983, Judicial Immunity and that petitioner's Civil Rights action is precluded by statute of limitations"; as to the Fifth Cause: "petitioner's Civil Rights action is precluded by statute of limitations; as to the Sixth Cause of Action: "Judicial Immunity, State Courts not liable under 42 USC 1983, Petitioner's Civil Rights action precluded by statute of limitation"; as to the Seventh Cause of Action: "Defendants immune pursuant to Gov. Code Section 860.2"; as to the Eighth Cause - "Judicial Immunity"; as to the Ninth Cause of Action - "judicial immunity"; as to the Tenth Cause of action - "judicial immunity."

On February 24, 1995, the Hon. Leighton Hatch, assigned, took under submission Defendant County of San Luis Obispo; Superior Court, County of San Luis Obispo; Judges: Warren C. Conklin; R. Donald Chapman; Harry E. Woolpert; Barry Hammer; and Christopher Money's Demurrer to Plaintiff's First Amended Complaint.

Further, on February 24, 1995, Judge Hatch took under submission Defendant Sinsheimer, Schiebelhut & Baggett, A Professional Corporation; Robert K. Schiebelhut; and Steven J. Adamski's Motion to Strike, and in Alternative

Demurrer to Plaintiff's First Amended Complaint, instructing Petitioner and counsel for both groups of defendants, to prepare, serve and submit, to the court clerk, on or before March 10, 1995, proposed orders, even though the Court failed to perform its duty or inform the parties of its ruling on which to base the proposed orders. Having the parties prepare and submit proposed orders to the court before the judge made a ruling is in excess of the court's jurisdiction. Copy of Transcript of February 24, 1995, hearing, P. 4:1115-22, 5:3-5, 9-11; 24:12-13, copy filed separately herewith as Exhibit "R" and incorporated herein by reference.

On February 24, 1995, petitioner requested "Ex Parte Application for Order Compelling Defendants Sinsheimer, Schiebelhut & Baggett; Robert K. Schiebelhut; Steven J Adamski; and Port San Luis Harbor District, et al; To Return Additional Copy of Record From Case No. 61331; transcript p. 22:5-25 through p.23:1-13. Judge heard the motion on February 27, 1995 and denied the application stating he agreed with defendants there is no rush to obtain return of the additional copy of the record, but as the court can see the Court's Executive Officer has pushed this case into At-Issue, will not remove it from Fast Track, so in fact there was a need and time was of the essence. Copy of Ex Parte Application and ruling filed separately herewith as Exhibit "X" and incorporated herein by reference.

The proposed orders, which the court requested, were submitted to the clerk as follows:

(1) On March 7,1995, the County, Superior Court and all Judges, copy filed herewith as Exhibit "S" and incorporated herein by reference;

(2) On March10, 1995, 2 orders by petitioner, appearing in propria persona; Exhibit "M" and "N";

(3) On March 15, 1995, 3 orders by Defendant Steven J. Adamski, attorney for Defendant Port San Luis Harbor District; and attorney for Sinshemeimer, Schiebelhut

& Baggett, a Professional Corporation; Robert K Schiebelhut; and representing himself, Steven J. Adamski. Copy filed separately herewith as Exhibit "T" and incorporated herein by reference.

On March 17, 1995, Judge Hatch signed defendant County, Superior Court and Judges' "ORDER SUSTAINING DEFENDANTS' DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND."

This signed order was not served on plaintiff, nor was a "Notice of Order" served. Plaintiff was not aware a decision had been rendered by the court until the Court's Executive Officer served the undersigned Minute Order on March 22, 1995, which reads, "The Court having submitted the above matters pending submission of proposed orders by Mrs. Gates and counsel and said proposed Orders having been submitted the Court now grants and signs the following: .....", Exhibit "C". The clerk's notice is insufficient. Mailing was not ordered by the court, therefore time to amend does not run from Clerk's notice, but notice of ruling served by defendants. CCP 664.5.

On March 21, 1995, Larry Reiner, Court's Executive Officer, served on petitioner, " ORDER TO SHOW CAUSE RE NON-COMPLIANCE', to appear on April 14, 1995, at 9:00 a.m. in the Master Calendar Department III pursuant to Superior Court Local Rule 9.17 to show cause why sanctions should not be imposed on petitioner for failure to comply with Superior Court Rules 9.10 et seq., Exhibit "Q".

Petitioner addressed the Superior Court Executive Officer on February 16, 1995; February 28,1995; March 6, 1995 and March 16 , 1995 and March 29, 1995 re: this case not being maintained in Fast track due to the Court's failure in setting defendants' Motions to Strike and Demurrers in a timely manner and the lengthy delay in being served "Notice of Orders", Exhibit "O".

The Court's letters in response to petitioner's concerns, dated March 2, 3, 7, and 20, 1995 filed as Exhibit "U" and incorporated herein by reference. The Court refuses to remove the case from Fast Track even though it is the Court's failure to schedule timely which has prevented case moving forward and has prevented discovery.

On March 23, 1995 petitioner circulated the Joint At-Issue Memorandum, which plaintiff is required to circulate pursuant to Local Rules 9.15, by Hand Delivering the original to the local attorney, defendant Steven J. Adamski and also forwarded a copy to attorneys Weakley and Arendt, Eldridge, Anderson & Weakley, by Certified Mail No. Z 037 606 537, as a precautionary measure to assure both parties would return the documents in adequate time for filing 5 court days before the hearing Exhibit "P".

On March 25, 1995 Defendant Adamski returned the original replying only as to Port San Luis Harbor District. On March 27, 1995 petitioner forwarded Joint At-Issue memorandum to attorneys Arendt, and Weakley located in Fresno, CA., by Certified Mail No. Z 03] 606 538. On March 30, 1995 petitioner wrote the attorneys, reminding them the memorandum must be filed before April 7, 1995, and enclosed a copy of the Order to Show Cause Re Non-Compliance, showing the time and place of hearing and explaining the local rules.

After working hours on March 29, 1995 petitioner received a copy of a letter dated March 28, 1995, addressed to Judge Hatch, from James J. Arendt stating in part: ". . . the Tenth Cause of Action was inadvertently omitted from that order. The amended order adds the Tenth Cause of Action." Copy of letter w/enclosure filed herewith as Exhibit "A". Defendants ask the court, out of court and off the record, to amend the order which defendant themselves drafted. Once the order is entered the court cannot set aside or modify an earlier order except through reconsideration. CCP 1008(a). "Section 1008 governs motions for

reconsideration by parties or the court itself. It is the exclusive means for modifying, amending or revoking an order. That limitation is expressly jurisdictional." Morite of California v. Superior Court (Grayson) (1993) 19 CA4th 485, 23 CR2d 666, 669 (Emphasis Added).

On March 29, 1995, defendants Sinsheimer, Schiebelhut & Baggett; Steven J. Adamski; and Robert K. Schiebelhut served a "Notice of Filing" as to these named defendants, signed by Judge Hatch on March 17, 1995. No "Notice of Ruling has been served on Petitioner as to defendants County, Superior Court or the Judges demurrer to Plaintiff's First Amended Complaint.

On April 5, 1995 attorney Weakley returned the original At-Issue Memorandum and has inserted at item 2, 'See Attachment "C"' and again at item 5, which petitioner assumes are his responses to those sections. Plaintiff has filed the Joint At-Issue this date to avoid dismissal sanctions from the lower court, Exhibit "P"

POINTS AND AUTHORITIES

1. JURISDICTIONAL ERROR COURT EXCEEDED JURISDICTION FAILURE TO PERFORM JUDICIAL DUTIES

The Supreme Court, Courts of Appeal and Superior Courts have original jurisdiction for extraordinary relief in the matter of mandamus, California Constitution, Article VI, Section 10. See CCP 1084, 1085.

An appellate court may consider a petition for an extraordinary writ at any time. Papelka Allard, McCowan & Jones v. Superior Court (1980) 107 CA3d 496, 165 CR 748.

Citing Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450; 20 CR 321. A writ of mandate/prohibition should issue to restrain the lower court of action contrary to case law because the act is prohibited

by Minsky v. Los Angeles (1974) 11C3d 111, 118, 113 CR 102. 5 Witkin Cal. Pro. (3rd Ed. 1985) Pleading Sections 942, 943, p. 378.

In the instant, the trial court erred, and sustained defendants demurrers without leave to amend, contrary to Code of Civil Procedure section 472d, constituting abuse of discretion. The trial court accepting defense counsels orders submitted prior to any Court rulings overlooks facts set forth in plaintiff's complaint and First Amended Complaint, of a specific nature sufficient to apprise these defendants of the allegations against them. Where a pleading liberally construed states a cause of action on any legal theory and that the defect can be cured by amendment it would be an abuse of discretion to sustain the demurrer. Minsky Supra p. 118.

Further, the courts have held: Pro se appellants failure to comply with formal requirements for appellants briefs as not justifying dismissal of appeal in Civil Rights case. Court of appeal as having duty to ensure that pro se litigants do not lose right to hearing on merits of claim because ignorance of technical procedural requirement. Balistreri v. Pacific Police Dept. (9th Cir. 1990) 901 F2d 696, 698-699.

Here, the trial court in upholding defense counsel's orders sustaining the demurrers without leave to amend, submitted prior to the court's own ruling or grounds has deprived plaintiff of a fair opportunity to correct any defect and plead her cause of action. The Court in Holtz v. Superior Court (1970) 3 Cal3d 296, 301, Fn.4; 90 CR 345, Cited in Coulter v. Superior Court 21 Cal.3d 144, 148; 145 CR 534 held: "Where it appears that the trial court has made a ruling which deprives a party of the opportunity to plead his cause of action or defense, relief by mandamus may be appropriate to prevent a needless and expensive trial and reversal."

A writ of prohibition is an appropriate remedy to arrest the proceedings of a court when there is not a plain,

speedy and adequate remedy in the ordinary course of law and when the proceedings of the court are without or in excess of its jurisdiction. CCP Sections 1002, 1103. Hagen v. Superior Court 53 C22d 498; 2 CR 288.

Here, a showing of exceptional circumstances supports petitioner's application for a writ of mandate and prohibition, (1) All judges of San Luis Obispo County Superior Court have disqualified themselves; (2) Lengthy delays of the Court's administrator scheduling hearings before a visiting judge; (3) the trial court acted in excess of its jurisdiction and prior to its ruling and statement of reasons, delegated authority to the attorneys to act as judges and draft orders, to their liking, which are not based on the Court's own statement of grounds, but upon defense attorneys own general arguments and not supported by a statement of reasons; (4) the trial court failed to follow the doctrine of stare decises.

2. DENIAL OF LEAVE TO AMEND ABUSE OF DISCRETION

In Pabitzky v. Frager 164 CA3d 410; 210 CR 426 (Feb. 1985) the court allowed plaintiff to amend the complaint with imaginative phrased cause of action six times before sustaining demurrer without leave to amend.

Here, though the court may not consider petitioner's amended complaint imaginatively phrased, it does state relevant facts contained in the allegations set forth in the complaint. Plaintiff has been denied sufficient opportunity to plead her causes of action. The trial court's refusal to allow plaintiff the opportunity to amend the complaint, that in this state is routinely granted, is extremely prejudicial. It is well settled in this state a denying a plaintiff a fair opportunity to amend, not only where the court considers the complaint defective, but where there is every reasonable possibility

plaintiff can state a good cause of action, is error and abuse of discretion. Von Batsch v. American Dist. Telegraph Co. 175 Ca3d 1111, 1119, 22 CR 239 (Dec. 1985); Careau v. Security Pacific Business Credit Inc. 222 CA3d 1371, 272 CR 387 (Aug. 1990).

The court in Careau Supra. p. 1387, held: if the proposed amended complaint states any valid cause of action the trial court must vacate its order sustaining the demurrer and grant plaintiff leave to file the amended complaint. [Emphasis Added].

In the instant, it has not been established or alleged, there is no reasonable possibility that plaintiff could amend her complaint to allege the necessary facts to state a valid cause of action.

Notwithstanding facts clearly stated, lack of precise form or language, or the insertion of irrelevant facts and requests for inappropriate relief, the rule is, and the Court in Glaire v. LaLanne Paris Health Spa, Inc. 12 C3d 915, 918, 117 CR 541, held: "in assessing the sufficienty of a complaint against a general demurrer, we must treat the demurrer as admitting all material facts properly pleaded. Scot v. City of Indian Wells (1992) 541, 548, 99 CR 745. Furthermore, we bear in mind our well established policy of liberality in reviewing a demurrer without leave to amend: "the allegation of the complaint must be liberally construed with a view of obtaining justice among the parties." See also Gressly v. Williams 193 CA2d 636, 639, 14 CR 496.

In the instant, sustaining the demurrers without leave to amend is not in the furtherance of justice. Here, the standard of review has been short-changed. The court's failure to state its own grounds in lieu of accepting verbatim defense counsel's, while acting as their own judges, deny plaintiff a fair opportunity to correct any substantive defect. See Johnson v. County of Los Angeles 143 CA3d 306, 191 CR 704 (May 1983). Plaintiff did not waive the judges specification of grounds, CCP 472d, and in her Objection,

filed March 29, 1995, Exhibit "C", notified the court of its failure to state grounds in the Minute Order served on plaintiff but not ordered by the trial judge. [Emphasis added].

As the court held in Von Bratsch Supra, p. 1117, citing Barquis v. Merchants Collection Assn. 7 C3d 94, 103, 101 CR 745, "It is error to sustain a demurrer where a plaintiff has stated a cause of action under any possible legal theory."

3. APPELLANTS CAUSES OF ACTION NOT TIME -BARRED

Each of appellant's causes of action against defendants Sinsheimer, Schiebelhut & Baggett, A Professional Corporation; Steven J. Adamski; and Robert K. Schiebelhut; is not time-barred, as defendants set forth in their order, Exhibit "B".

It is a well established principal, amended complaints may be relate back to filing of original complaint and avoids bar of statute of limitations, where recovery is based on same general set off facts as in petitioner's 42 USC 1983 action.

Here, general facts set forth in complaint filed July 18, 1993 Exhibit "D", are the same facts set forth in the First Amended Complaint served on these defendants and filed on January 5, 1994, Exhibit "I".

4. STATUTE OF LIMITATION SUBJECT TO EQUITABLE TOLLING DOCTRINE

It is long settled and established law in the State of California that a plaintiff has an obligation to exhaust other administrative or judicial remedies before an action may be maintained. Under the provisions of Code of Civil Procedure, section 356, the plaintiff is not required to commence the action as described in California Code of Civil Procedure, section 350, until such time as other administrative or judicial remedies have been exhausted. Dillon v. Board of Pension Commissioners (1941) 18 Cal2d 427, 116 P2d 37; Olson v. Sacramento (1974) 38 CA3d 958,

113 CR 664; and Valco v. University of Southern California (1977) 67 CA3d 887, 136 CR 865. In essence, the cause of action is not deemed occurred until such time as the administrative or judicial remedies are exhausted.

In Addison v. State of California, 21 Cal3d 313; 146 CR 224, the Supreme Court reversed and remanded with directions to over-rule defendant's demurrer. The policy of California law favoring the avoidance of forfeitures and allowing good faith litigants their day in court is fostered by the "equitable tolling" doctrine, which relieves a plaintiff from the bar of limitations statute when possessing several legal remedies, he reasonably and in good faith pursues one designed to lesson the extent of his injuries or damage and when defendant has had timely notice of the claim and is not prejudiced by application of the doctrine. Here, defendants were timely noticed of each judicial remedy sought, and application of the doctrine has not prejudiced defendants. Plaintiff proceeded to exhaust her administrative and judicial remedies regarding the underlying action from which this case arises.

Judicial remedies were finalized with the courts on October 4, 1993, Copy of U.S. Supreme Court ruling filed separately herewith as Exhibit "V" and incorporated by reference. Alternate administrative legal remedies with the San Luis Obispo County District Attorney and Grand Jury were finalized January 14, 1994. Copy filed separately herewith as Exhibit "W" and incorporated herein by reference. Pursuant to CCP Section 340, plaintiff's complaint filed on July 18, 1994 and First Amended Complaint filed on December 19, 1994, are within the statute of limitations. See Exhibit "K", p. 31:1-28 through 33:1-19.

5. DEFENDANTS HAVE KNOWN FOR YEARS OF CHARGES ALLEGED

On July 18, 1994, plaintiff's original complaint was served on defendant PORT SAN LUIS HARBOR

DISTRICT, their agents and representatives, by personal service. These answering defendants Sinsheimer, Schiebelhut & Baggett, A Professional Corporation; Steven J. Adamski; and Robert K. Schiebelhut, legal counsel for the District, at all times material, were, and remain agents and representatives of defendant District. These defendants answered the complaint in the name of the District, only. Having received, and read the complaint, the thereafter their preparation of the District's answer, signed by defendant Adamski, confirms these defendants were well informed and fully aware, as agents and representatives of the District, that they were the defendants alleged to be coconspirators in the illegal acts of removing documents from the court file as set forth in plaintiff's First and Third Causes of Action.

On November 28, 1994, at the hearing before the Hon. Jay Ballantyne, on the County of San Luis Obispo's Demurrer and Motion to Strike, these defendants were in default pursuant to CCP 585, their failure to appear, answer or demur to the complaint. Default judgment was neither requested nor issued. Judge Ballantyne in his ruling afforded plaintiff leave to amend her complaint with instructions to add who did what and when with specificity and particularity as to the acts and/omissions as alleged in the complaint. Johnson v. Threats 140 CA3d 287, 189 CR 447. Copy of November 29,1994 Hearing Transcript, Exhibit "G".

Plaintiff, in specificity, and with leave of court, added these named defendants in lieu of agents and representatives as set forth in the complaint. The notice served on these demurring defendants on December 19, 1994, containing the same general facts, relates back to the original complaint served on July 18,1994. Further, these defendants, after trial of Case No. 61331, in which plaintiff was the prevailing party, were served all subsequent pleadings filed with the Court of Appeal, California Supreme Court and the United States Supreme Court. By virtue of such notice, knew, or should have known, of the allegations

against them as agents and representatives of Port San Luis Harbor District and therefore were notices as defendants in this action. Such notice and knowledge does not support defendants' contention the action against them is time barred. Further, administrative remedies were finalized January 19, 1994, Exhibit "W" and the statute of limitations had not run. Therefore, neither the complaint served on July 18, 1994 nor the notice to defendants served in December 1994 are time barred.

Defendants claim a legal defense of immunity because they represent a public entity in a civil action. The immunity claimed is not available to these defendants, as set forth in Plaintiff's Memorandum of Points and Authorities in Opposition to these Defendants' Motion to Strike and in the Alternative Demurrer, Exhibit "K", p.33:20-28 through p.35:1-21.

Here, the court erred in the sustaining demurrers in general terms, set forth in orders drafted by defendants without a statement of reasons as required by CCP 472d. Therefore petitioner should not be precluded from further addressing the matter of specificity. Muraoka v. Budget Rent A Car, Inc: (1984) 160 CA3d 107, 115, 206 CR 476. Plaintiff's amended complaint sets forth sufficient facts to constitute a cause of action. The unavailability of the immunity doctrine and statute of limitations being inapplicable, petitioner's complaint does withstand demurrer.

6. VIOLATION OF STATUTES-FAILURE TO EXERCISE DUE CARE PRESUMED

Here, plaintiff stood in a special relationship to defendants of which the scope and legal duty to plaintiff and citizens of this county and state are commonly understood and relied on. As members of the judicial system and the California Bar Association, Defendants have sworn to uphold the laws of this state and the Constitution of the United States. Therefore a legal duty exists to plaintiff and

all citizens who rely on these defendants to refrain from unreasonable and illegal acts known to deprive persons of their constitutional rights. Breach of that duty is actionable under 42 USC 1983. State courts are required to apply federal law in determining whether a complaint pleads a cause of action under Sec. 1983 sufficient to survive a general demurrer. Thorning v. Hollister School District (1992) 11 CA2th 1589, 1609-1610; 15 CR2d 91. Here, defendants acts of conspiratorial conduct makes action applicable under 42 USC 1983 in the absence of all immunity. See Lipson v. Snyder 701 F Supp E.D. Pa. (1988). Deprivation of constitutional rights under the Fourteenth Amendment of the U.S. Constitution occurs at the time the act was committed. See Lipson Supra, Fn.3 p.544.

In the instant plaintiff alleged she is a member of a class of persons certain statutes were designed to protect. Evidence Code sec.669 provides that a person will be presumed to have failed to exercise due care if (1) he or she has violated a statute ordinance or regulation of a public entity, (2) the violation was the proximate cause of injury, (3) the jury resulted from an occurrence the nature of which the statute was to prevent and, (4) the injured person was one of the class of persons for whose protection the statute, ordinance or regulation was adapted. [Evid. Code sec. 669(a).

More generally, persons who possess knowledge, skill or intelligence superior to that of the ordinary prudent person are under a duty to exercise a degree of care that is consistent with that knowledge, skill or intelligence. [See Prosser and Keeton on the law of torts (5th Ed. 1984) Ch. 5, Negligence: Standard of Conduct sec 32 p.185].

Heightened standards of care have been commonly imposed on attorneys. See Heyer v. Flaig (1969) 70 Cal2d 223, 229; 74 CR 225. This would include judges as members of the same judicial system and California Bar Association. As a class of persons appearing before the County of San

Luis Obispo Superior Court pursuing litigation in the furtherance of justice plaintiff stood in a special relationship to these defendants and Superior Court Judges, employees of the County of San Luis Obispo, admitted in the County's yet to be noticed, Order Sustaining Defendants' Demurrer to Plaintiff's First Amended Complaint, Exhibit "A".

Notwithstanding Civil Code 1714(a) the Supreme Court has held that unless a statutory provision provides an exception to the fundamental principals of Civil Code 1714, no such exception should be made unless clearly supported by public policy. (Roland v. Christian (1968) 69 Cal2d 108,112, 70 CR 97. Here, defendants have failed to allege any exception nor is an exception available to them. Further, plaintiff has met the threshold requirement of showing deprivation of right secured by the laws of this state and the Fourteenth Amendment to the Constitution of the United States. Therefore the acts of defendant Judges, employees of the County, acting under color of law, absent all jurisdiction makes applicable 42 USC 1983.

CONCLUSION

For all the foregoing reasons appellant requests a writ issue under the seal of this court, directing the lower court to vacate its prior orders sustaining defendants demurrers without leave to amend and make new and different orders granting appellant leave, without prejudice, to file further amendments to the First Amended Complaint and grant an "Immediate Stay" of proceedings to set an extending Fast Track schedule to afford the parties time to conduct discovery.

Respectfully submitted,
Dated: April 6, 1995

EVA M. GATES, Petitioner,
propria persona.

VERIFICATION

I, EVA M. GATES, am the petitioner in this proceeding. I have read the foregoing petition and know its contents. The facts stated therein are true and are within my personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: April 6,1995

EVA M. GATES, Petitioner

COURT OF APPEAL, SECOND APPELLATE DISTRICT
DIVISION SIX , STATE OF CALIFORNIA

EVA GATES — Petitioner,

v.

B0901811; (Sup. Ct. No. CV 075846)
San Luis Obispo County
Leighton Hatch, Judge

SUPERIOR COURT
COUNTY OF SAN LUIS
OBISPO, et al., — Real Parties in Interest,

ORDER
(Filed April 11, 1995)

We have read and considered the petition for writ of mandate filed on April 6, 1995. We deny the petition. (Phelan v. Superior Court (1950) 35 Cal.2d 363, 370; Collins v. City & County of San Francisco (1952) 112 Cal.App.2d 719, 722)

IN THE SUPREME COURT OF CALIFORNIA

EVA M. GATES Appellant,

v. SO56533
(2nd App. Dist., Div. Six, No.BO946004)

THE COUNTY OF SAN
LUIS OBISPO, et al.,

Respondents,

ORDER
(Filed Nov. 13 1996)

Appellant's petition for review DENIED.

GEORGE
Chief Justice

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX STATE OF CALIFORNIA,

EVE M. GATES Appellant,

v. 2 Civil BO94604
San Luis Obispo No. CV 75846

The COUNTY OF SAN LUIS OBISPO, et al.,

Respondents,

ORDER
(Filed Dec. 3, 1996)

THE COURT:

MOTION TO STAY ISSUANCE OF REMITTITUR IS DENIED

COURT OF APPEAL, SECOND APPELLATE DISTRICT
DIVISION SIX, STATE OF CALIFORNIA

EVA M. GATES Appellant,

v. 2 Civil BO94604
San Luis Obispo No. CV-O75846

The COUNTY OF SAN LUIS
OBISPO, et al., Respondents,

REMITTITUR NOTICE
(Filed Dec. 13, 1996)

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above-entitled cause on 08/28/96 is now final.

** AFFIRMED IN FULL. **

Costs To Respondents.

Joseph A. Lane, Clerk

By : MARY J. ROSA
Deputy Clerk

COURT OF APPEAL, SECOND APPELLATE DISTRICT
DIVISION SIX, STATE OF CALIFORNIA

EVA M. GATES Appellant,

v.

2 Civil BO94604
San Luis Obispo No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Respondent,

ORDER
(Filed Sept. 20, 1996)

THE COURT:

Petition for rehearing denied

UNITED STATES CONSTITUTION
AMENDMENT XIV
[Citizen's Rights]

Section 1. Citizenship; Due process;
Equal protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United Sates and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CODE OF CIVIL PROCEDURE
SECTION 1008

(c) If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order.

(d) A violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.5. In addition, an order made contrary to this section be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending.

(e) This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.

Added Stats 1983 ch 631 Section 2, Amended Stats 1992 ch 460 Section 4 (SB1805).

CALIFORNIA PENAL CODE TITLE 7 CRIMES AGAINST PUBLIC JUSTICE, CHAPTER 4 FORGING, STEALING, MUTILATING, AND FALSIFYING JUDICIAL AND PUBLIC RECORDS AND DOCUMENTS, SECTION 115

Section 115. Procuring or offering false of forged instrument for record; violations; punishment

(a) Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony.

(b) Each instrument which is procured or offered to be filed, registered, or recorded in violation of subdivision (a) shall constitute a separate violation of this section.

(c) Except in unusual cases where the interests of justice would best be served if probation is granted, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following person:

(1) Any person with a prior conviction under this section who is again convicted of a violation of this section in a separate proceeding.

(2) Any person who is convicted of more than one violation of this section in a single proceeding, with intent to defraud another, and where the violations resulted in a cumulative financial loss exceeding one hundred thousand dollars ($100,000).

(d) For purposes of prosecution under this section, each act of procurement or of offering a false or forged instrument to be filed, registered, or recorded shall be considered a separately punishable offense.

CALIFORNIA PENAL CODE, TITLE 7
CRIMES AGAINST PUBLIC JUSTICE, CONSPIRACY
SECTIONS 182 AND 184

Section 182. Definition; punishment; venue

If two or more persons conspire:

1. To commit any crime.

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

3. Falsely to move or maintain any suit, action or proceeding.

4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises.

5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

6. To commit any crime against the person of the President or Vice President of the United States, the governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows:

When they conspire to commit any crime against the person of any official specified in subdivision 6, they are guilty of a felony and are punishable by

imprisonment in the state prison for five, seven, or nine years.

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit such felony shall be that prescribed for the lessor degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

When they conspire to do an act described in subdivision 4 of this section, they shall be punishable by imprisonment in the state prison, or by imprisonment in the county jail for not more than one year, or by a fine not exceeding ten thousand dollars ($10,000) or both.

All cases of conspiracy may be

prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done.

Section 184. Overt act; venue

No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done.

CALIFORNIA GOVERNMENT CODE SECTION 6200

Section 6200. Offenses by official custodian.

Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment in the state prison for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to do any of the following:

(a) Steal, remove, or secrete.

(b) Destroy, mutilate, or deface.

(c) Alter or falsify.

CALIFORNIA GOVERNMENT CODE SECTION 6201

Section 6201. Offenses by persons other than officers

Every person not an officer referred to in Section 6200, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars ($1,000), or by both such fine and imprisonment.

Amended Stats 1983 ch 1092 Section 130, effective September 27, 1983, operative January 1, 1984.

GOVERNMENT CODE SECTION 815.3

(a) Notwithstanding any other provision of this part, unless the elected official and the public entity are named as codefendants in the same action, a public entity is not liable to a plaintiff under this part for any act or omission of an elected official employed by or otherwise representing that public entity, which act or omission constitutes an intentional tort, including, but not limited to, harassment, sexual battery, and intentional infliction of emotional distress. For purpose of this section, harassment in violation of state or federal law constitutes an intentional tort, to the extent permitted by federal law. This section shall not apply to defamation.

CALIFORNIA CODE OF CIVIL PROCEDURE
SECTION 437 c (f)

437 c (f)(1) A party may move for summary adjudication as to one or more causes of action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

(n) A cause of action has no merit if either of the following exists:

(1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded.

(2) A defendant establishes a affirmadefense to that cause of action.

(o) For purposes of motions for summary judgment and summary adjudication:

(1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action.

Once the plaintiff or cross-complainant has met that burden the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations of denial of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.

(2) A defendant or cross-defendant has met his burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a trial issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material facts exists as to that cause of action or a defense thereto.

SAN LUIS OBISPO SUPERIOR COURT RULES
RULE 7.14
Effective January 1, 1996

SUMMARY JUDGMENT/ SUMMARY ADJUDICATION OF ISSUES

Motions for Summary Judgment and Motions for Summary Adjudication of Issues (CCP Sec. 437(c) shall be separately made. In moving for Summary Adjudication, moving parties shall limit issues proposed for adjudication to only this issues which are authorized by CCP Sec. 437 c(f), as follows:

1. That a cause of action is meritless as to a moving defendant, or that a cause of action is established in favor of a moving plaintiff;
2. That an affirmative defense to a cause of action lacks merit;
3. That a claim for punitive damages lacks merit; or
4. That a defendant did not owe a duty to plaintiff(s).

MORITE OF CALIFORNIA V. SUPERIOR COURT
19 Cal. App. 4th 485; 23 Cal Rptr. 666
(Oct. 1993)

Defendants in a pending action involving wrongful termination filed a motion to stay a separate action concerning insurance coverage pending disposition of the underlying wrongful termination case. The trial court granted the motion and entered a stay . At the status conference of the insurance action, the new judge ordered some, but not all, causes of action set for trial and stated that he did not consider the insurance plaintiff's request that the stay order be lifted as a motion for reconsideration. Defendants objected both orally and in writing that the court lacked jurisdiction to set the case for trial without formally reconsidering the stay order, and they subsequently filed a petition for writ relief. (Superior Court of Los Angles County, No. BC014438, Joseph R. Kalin, judge).

On May 20, 1993, the court stayed the trials in the superior court pending further order of appellate court but not the preparatory proceedings. Following the filing of opposition, the court issued its "Order and Alternative Writ of Mandate" and further stayed the trials in the superior court pending further order of appellate court.

The Court of Appeal issued a peremptory writ of mandate commanding the trial court to vacate its order setting the matter for Trial. The court held, in a question of first impression under the newly enacted Code of Civil Procedure Sec. 1008, subd. (e), that CCP Sec. 1008, is the exclusive means for modifying, amending, or revoking an order and is expressly jurisdictional. The court held that by ignoring , and thereby implicitly revoking , the stay order, the trial judge undermined the legislative intent behind CCP Sec. 1008, subd. (e) and undermined the general rule that one trial judge may not reconsider and overrule an interim

ruling of another judge. (Opinion by (Fred) . J. with Lillie, P.J. and Johnson, J., concurring.).

The new amendment is clear that section 1008 applies to interim orders, such as the prior stay of order in this instance, and is jurisdictional.

Section 1008, subd. (e), the jurisdictional limitation, was added by an act of the Legislature in 1992. (Stats. 1992, ch. 460, sec. 4.) The Legislative Council's Digest concerning the act amending section 1008 states:

"The Legislature finds and declares the following:

"(a) Since the enactment of Section 1008 of the Code of Civil Procedure some California courts have found that the section does not apply to interim orders.

"(b) In enacting Section 4 of this act, it is the intent if the Legislature to clarify that no motions to reconsider any order made by a judge or a court whether that order is interim of final, may be heard unless the motion is filed within 10 days after service of written notice of entry of the order, and unless based on new or different facts, circumstances, or law. "(c) In enacting Section 4 of this act, it is the further intent of the Legislature to clarify that no renewal of a previous motion, whether the order deciding the previous motion is interim or final, may be heard unless the motion is based on new or different facts, circumstances, or law.

"(d) Inclusion of interim orders within the application of Section 1008 is desirable in order to reduce the number of motions to reconsider and renewals of previous motions heard by judges in this state." (Stats. 1992, ch.460, sec. 1.)

Respondent court cannot avoid the jurisdictional limits of section 1008 (e) by consciously ignoring the stay order instead of modifying, amending or revoking after proper reconsideration.

Respondent court circumvented the jurisdictional limits of section 1008 (e) by consciously ignoring the stay

order which had been entemed by a predecessor judge of the same court. The trial judge stated on the record that he was not reconsidering the stay order. Acting consistent with that statement, the trial judge entered his order of April 8, 1993 which set the declaratory relief action for trial on July 12, 1993. The order does not specifically lift the stay ordered by the predecessor judge but, by implication, has the same effect.

Because section 1008 (e) is newly enacted , research discloses no cases directly on point. However logic dictates the following argument: if courts may simply ignore interim orders instead of modifying, amending or revoking them after due consideration, then the procedural, substantive and jurisdictional requirements of section 1008 are meaningless. By making section 1008 expressly jurisdictional, the Legislature clearly intended to prevent courts from modifying, amending or revoking prior orders without due reconsideration. Ignoring (i.e. implicitly revoking) interim orders, such as the prior stay order, undermines the legislative intent behind section 1008(e).

The alternative writ of mandate filed herein on June 14, 1993 , is discharged. Let a peremptory writ of mandate issue commanding respondent superior court to vacate its order of April 8, 1993, in Los Angles County Superior Court case No. BC014438 setting the matter for trial.

PEOPLE V. PARKS

7 Cal . App. 4th 883; 9 Cal. Rptr. 2d 450

(June 1992)

A jury convicted defendant of two counts of filing a false instrument (Pen. Code. Section 115(a), one count of battery (Pen. Code Section 242), and one count of altering a public record (Gov. Code Section 6201). Defendant has attempted to visit his former girlfriend and had battered her current boyfriend. Subsequently, defendant obtained an ex parte temporary restraining order enjoining the girlfriend from contacting or harassing him. Before delivering a copy of the order to the marshal, defendant altered the instrument to include false requirements. (Superior Court of San Diego County, No. CR116530, Herbert J. Exarthos, Judge.)

The Court of Appeal affirmed. It held that the altered temporary restraining order qualified as both an instrument under Pen. Code Sec. 115(a), and a public record under Gov. Code Sec. 6201. (Opinion by Nares, J., with Kremer, P.J., and Work, J., concurring.)

An altered temporary restraining order was an "instrument" for purposes of Pen. Code sec. 115 (filing false instrument). thus defendant's conviction of violating Section 115 and Gov. Code sec. 6201 (altering public record) was not improper, where he had obtained an ex parte order enjoining his former girlfriend from contacting or harassing him, and had added false requirements to the order before filing it with the marshal. Although prior case law had required that a document represent an agreement in order to qualify as an "instrument", a more recent appellate court opinion rejected this requirement. Subsequently, the Legislature extensively revised sec. 115, 1984 (Stats. 1984, ch.1397, pp. 4905-4908), after the decision in Generes v. Justice Court (1980) 106 CA3d 678, 682-684, 165 CR 222, leading to the presumption that the more recent case was approved. Moreover, the amendments to sec. 115

demonstrate a legislative intent to protect judicial and public records such as the temporary restraining order.

A temporary restraining order is a "public record" for purposes of Gov. Code sec. 6201 (altering public record) Court records are public records, Estate of Hearst (1977) 67 CA3d 777, 782, 136 CR 812, Peole v. McKenna (1953) 116 CA2d 207, 211,255 P2d 452, and documents in a court file are public records. When Parks obtained and falsified this public record he committed the offense proscribed by Gov. Code sec.6200-6201, and thus was properly found " guilty of a felony".

As enacted in 1872, section 115 was one of five sections which formed chapter 4 of the Penal Code. Chapter 4 was and is entitled "Forging, Stealing, Mutilating, and Falsifying Judicial and Public Records and Documents." The " ostensible objects to be achieved " were the integrity of judicial and public records." The "evils to be remedies" clearly included "forging, stealing, mutilating, and falsifying such records. Whatever else may be meant by word "instrument," on these facts the court found that protection of judicial and public records such as the documents in this case was clearly within the legislative intent of section 115.

San Luis Obispo County
GRAND JURY
January 19, 1994

Donald Gates,
Eva Gates,
140 South Dolliver
Pismo Beach, CA 93449

Dear Mr. and Mrs. Gates:

The 1993-1994 San Luis Obispo County Grand Jury has considered your letter dated October 29, 1993. In your letter you stated the grand jury had not responded to your phone call in August of 1993. Shortly after your phone call your complaint was reviewed, and a response has been approved by the grand jury which we believe had been mailed to you. After reviewing our procedures for processing and sending out correspondence we cannot be certain our response was actually mailed.

The grand jury does have a draft of this letter in its files which is enclosed The grand jury would like to assure you that careful consideration has been given to your complaint, however, our preliminary inquiry did not justify continued investigation into your allegations.

The grand jury will consider further inquiry into your complaint if you can furnish pertinent information not previously brought to the grand jury's attention.

Sincerely,

S/Dr. Frances Parker, Forewoman
1993-1994 San Luis Obispo County Grand Jury
Encl:

Enclosure to January 19, 1994 Grand Jury Letter:
August , 1993

Donald Gates
Eva Gates
140 S. Dolliver #69
Pismo Beach, Ca. 93449

Dear Mr. and Mrs. Gates,

The San Luis Obispo County grand jury, through the Law and Justice committee, has studied the allegations contained in your letter dated July 12 , 1993.

It is the understanding of this jury that the complaint, as you state it , was presented to a previous grand jury, and after consideration, the case was closed. It will not be reopened unless you can furnish new evidence or new data not previously brought to the jury's attention.

The grand jury will, however , bear in mind your complaint in its consideration of related matters.

Sincerely,

January 31, 1994

San Luis Obispo County Grand Jury
County Government Center
San Luis Obispo, CA 93408

Re: Citizen's Complaint, File #69, Filed December 29, 1992, Crime Against Public Justice, Alerting Public Records, Conspiracy

To the Grand Jury:

We are in receipt of your letter dated January 19, 1994.

Your letter indicates there is no file or legitimate dated documents in the grand jury files regarding our complaint. This leads us to believe the grand jury file has been destroyed and your letter of January 19, 1994 was triggered, after several months, because we filed a claim against the county of San Luis Obispo. Have the records in file #69 been destroyed?

In the event the grand jury file has been destroyed, has the Grand Jury reviewed the public records, regarding this complaint, in the San Luis Obispo County District Attorney's Office? The District Attorney refused to assign a file number to this complaint but you should be able to determine if the District Attorney's file has been destroyed by questioning Brad Kyle Victim/Witness Coordinator II, Room 121,County Government Center, 781-5821. He was the last person we saw with the file. It had been moved out of the District Attorney's office into an office across the street from the courthouse. The District Attorney's file contains pertinent information which was not given to us.

If the District Attorney advised the Grand Jury to close the file on this complaint before a thorough investigation

was done by his office, then it's the Grand Jury's duty to request assistance from the State Attorney General. And if he also refuses to investigate then the Grand Jury should request assistance from the United States Attorney General.

If the Grand Jury intends to investigate the District Attorney for his failure to do his job for the public, then we will furnish everything we possibly can to the Grand Jury on a confidential basis. We do not wish to feed information to the Grand Jury to be channeled to the District Attorney's office, or to the Presiding Judge or other judges of the Superior Court.

Sincerely,

S/Donald B. Gates

S/Eva M. Gates

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

DONALD B. GATES and
EVA M. GATES — Plaintiffs,

v. — CASE NO CV61331

Port San Luis Harbor
District, et al. — Defendants

PORT SAN LUIS HARBOR DISTRICT
Cross-Complainant,

v.

DONALD B. GATES and EVA M. GATES
Cross-Defendants.

JUDGMENT AFTER TRIAL BY JURY
(Filed January 16, 1991)

This action came on regularly for trial by jury on December 3, 1990, in the above entitled Court, the Honorable Donald R. Chapman, Superior Court Judge, presiding Plaintiffs Donald B. Gates and Eva M. Gates appeared in propria persona, and defendants Port San Luis Harbor District and Jack Rodin, jr. appeared by their attorneys Steven J. Adamski, Bar No. 103977, and Sinsheimer, Schiebelhut & Baggett, 1010 Peach Street, San Luis Obispo, CA. 93401.

A jury of twelve (12) persons was regularly impaneled and sworn to try the action. Witnesses on the part of both plaintiffs and defendants were sworn and testified and documentary evidence was presented by both plaintiffs and

defendants. After hearing the evidence and arguments of parties and counsel and after being instructed by this court, the jury retired and commenced its deliberations on December 28, 1990. The jury subsequently, on January 2, 1991, at approximately 7:00 p.m., returned and rendered in writing the following special verdicts:

SPECIAL VERDICTS

We, the jury in the above case, find the following special verdict on the issues submitted to us:

ON COMPLAINT

A. NEGLIGENCE

1. Was Defendant Port San Luis Harbor District negligent?

Answer: Yes X No __

2. Was Defendant Jack Jr. negligent?

Answer: Yes X No __

If you answered either question 1 or 2 yes, answer question 3:

3. Was the negligence of either Defendant a legal cause of injury to the property of Plaintiffs Donald B. Gates and Eva M. Gates?

Answer: Yes X No __

B. PREMISES LIABILITY.

4. Do you find that the public property involved in this action was in a dangerous condition?

Answer: Yes __ No X

If your answer to question 4 is yes, answer question 5:

5. Did Port San Luis Harbor District have sufficient actual or constructive notice of the dangerous condition prior to the accident to have taken measures to protect against the dangerous condition?

Answer: Yes __ No __

If your answer to question 5 is yes, answer question 6:

6. Did Defendant Port San Luis Harbor District take reasonable actions prior to the accident to protect against the risk of damage?

Answer: Yes __ No __

If your answers to questions 4 and 5 is yes and your answer to question 6 is no, answer question 7:

7. Was the dangerous condition a legal cause of injury to Plaintiffs' property?

Answer: Yes __ No __

C. BREACH OF CONTRACT

8. Did Defendant Port San Luis Harbor District breach its contract with Plaintiffs Donald B. Gates and Eva M. Gates?

Answer: Yes __ No X

If your answer to question 8 is yes, answer question 9:

9. Was the breach a legal cause of injury to Plaintiffs' property?

Answer: Yes __ No __

D. DAMAGES

Answer question 10 only if you have answered yes to either question 3, 7 or 9.

10. What is the total amount of damages suffered by Plaintiffs as a legal result of the accident?

Answer: $35,000.00

E. HOLD HARMLESS CLAUSE

11. Is the exculpatory or "hold harmless" clause contained in the contract executed by Plaintiff Donald B. Gates enforceable?

Answer: Yes __ No X

ON CROSS-COMPLAINT

12. Do you find that Cross-defendants Donald B. Gates and Eva M. Gates breached the contract with Cross-Complainant Port San Luis Harbor District?

Answer: Yes X No __

If your answer to question 12 is yes, answer question 13:

13. Was the breach a legal cause of injury to Cross-Complainant Port San Luis Harbor District?

Answer: Yes X No __

If your answer to question 13 is yes, answer question 14:

14. What is the total amount of damages suffered by Cross-Complainant Port San Luis Harbor District as a result of the breach?

Answer: $ 1919.95 .

It appearing that by reason of the foregoing special verdicts, plaintiffs are the "prevailing parties" and are entitled to judgment against defendants Port San Luis Harbor District and Jack Rodin, Jr. on the complaint herein for damages; for interest; and for costs.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that plaintiffs shall have and recover from defendants PORT SAN LUIS HARBOR DISTRICT and JACK RODIN, Jr., as follows:

(1) the sum of thirty-five thousand dollars ($35,000);

(2) prejudgment interest thereon, pursuant to Civil Code section 3287, and as prayed for in the complaint on file herein, from January 1, 1986 (the date of initial filing of the suit), to January 2, 1991 (date verdict returned), at the legal rate, in the sum of seventeen thousand five hundred nine and fifty-nine hundredths dollars ($17,509,59); DENIED January 16, 1991, by Honorable Donald R. Chapman, Superior Court Judge, presiding.

(3) postjudgment interest thereon at the rate of ten percent (10%) per annum from the date of the verdict until paid; and,

(4) costs and disbursements in the amount of $_____, pursuant to plaintiff's Memorandum of Costs filed and served herein on January 4, 1991. According to proof Honorable Donald R. Chapman, Superior Court Judge, presiding.

It appearing that by reason of those special verdicts, defendant Port San Luis Harbor District is entitled to judgment against plaintiff Donald B. Gates on the cross-complaint herein for damages.

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that defendant PORT SAN LUIS HARBOR DISTRICT shall have and recover from plaintiff DONALD B. GATES, as follows:

(1) the sum of one thousand nine hundred nineteen and ninety-five hundredths dollars ($1919.95);

(2) prejudgment interest thereon, pursuant to Civil Code section 3287, from June 3, 1986 (the date cross-complaint filed), to January 2, 1991 (date verdict returned), at the legal rate, in the sum of eight hundred seventy-nine and forty-five hundredths dollars ($879.45); and,

(3) postjudgment interest thereon at the rate of ten percent (10%) per annum from the date of the verdict until paid.

Dated January 16, 1991

S/R. Donald Chapman
Judge of the Superior Court

NOT TO BE PUBLISHED

COURT OF APPEAL, CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

Donald B. Gates , et al.,

Plaintiffs, Cross-
Defendants and Appellants

2d Civil No. BO57338
(Super. Ct. No. 61331
(San Luis Obispo County)

PORT SAN LUIS HARBOR DISTRICT

Defendant, Cross-
Complainant and Appellant

JACK RODIN, JR., et al.,

Defendants and Appellants.

OPINION
(Filed December 9, 1992)

Donald and Eva Gates (Gates) brought their vessel to Port San Luis Harbor District (Port) for routine maintenance. 1/ During the haul out , Port damaged the boat.

Gates sued Port and numerous individuals on various theories, e.g. negligence and breach of contract.

1/ We refer to Gates in the singular for reader clarity. Further references to "Gates" include both appellants unless otherwise indicated

Port cross-complained for payment on the contract with Donald Gates. Trial by jury ensued on negligence, premises liability and breach of contract as to Port and Jack Rodin.

On special verdicts, the jury awarded Gates $35,000 for Port's negligence and awarded Port $1,919.95 for breach of contract. The trial court awarded Gates $15,979.36 in costs; it awarded Port $513.50 for costs. It denied prejudgement interest to Gates and awarded prejudgement interest to Port. The trial court did not award attorney fees to either party. Gates, Port and Rodin appeal from portions of the judgment and from various orders issued by the trial court. Port's motion to dismiss Gates' appeal is denied. (Lee v. Brown (1976) 18 Cal. 3d 110, 113, 115.)

Gates contends: 1. the damages awarded them are inadequate, 2. the negligence verdict is inconsistent with the verdict for Port on the contract. 3. the trial court ered in denying attorney fees, certain expert witness fees, prejudgement interest and other expenses, 4. the trial court erred in rulings on various evidentiary issues, and 5. the trial court and counsel engaged in prejudicial misconduct.

Port and Rodin contend that Gates, action is barred by an exculpatory clause in the contract and that the court abused its discretion in denying attorney fees on the contract. We affirm.

DISCUSSION

Loss of Use Instructions

Gates contends he was entitled to a modified version of BAJI No. 14.22 to allow damages for fair rental value, known as detention, for approximately five years longer that the time necessary for repair because their vessel is a home. Not So.

The trial court gave the following modified standard BAJI No. 14.22 (1986 rev.): "Reasonable compensation to plaintiff for being deprived of the use of his [property]

during the time reasonably necessary for repairing the damage [legally] resulting from the accident. In determining that amount you may consider the reasonable rental value of the [property] for the period of time just mentioned."

In Valencia v. Shell Oil Co. (1944) 23 Cal.2 840, 844, the California Supreme Court stated that "[w]here a vehicle is damaged by the wrongful act of another, the owner is entitled to recover for the damage done to the vehicle and for the loss sustained by being deprived of its use. [Citations.] . . . [A]n owner's recovery for being deprived of the use of a damaged vehicle is generally to be determined with reference to the period of the time reasonably required for the making of repairs. [Citations.]"

That the vessel was also Gates' home is not controlling. The Vehicle Code describes a vessel to include "(a) . . . every description of watercraft used or capable of being used as a means of transportation on water, except the following: . . .(3) A floating structure which is designed and built to be used as a stationary waterborne residential dwelling . . . ." (Veh. Code, section 9840; also see Health and Saf. Code, section 18075.55 regarding such floating homes, and Civ. Code, section 800.6 which defines a homeowner as one who "resides in a floating home. . . .")

Gates' vessel is a "watercraft used as capable or being used as a means of transportation on water"(Harb. & Nav. Code, section 651, subd. (g).) It must be registered with the Department of Motor Vehicles. (Harb.& Nav. Cod, section 651, subd. (n).)

Diminution in Value Instruction

Without citation to authority, Gates argues entitlement to an instruction permitting damages for both the cost of repairs and for diminution in value because the vessel cannot be restored to its original condition

The trial court gave a modified version of an instruction requested by Gates, BAJI NO. 1420 (1986

version). The instruction states : "If the damages have been repaired, or are capable of repair, so as to restore the fair market value as it existed immediately before the accident, at a cost less than such difference in value, then the measure of damage is the cost of such repair rather than such difference in value. . . .

If repairs have been made but the property cannot be completely repaired, the measure of damages is the difference in the fair market value of the property immediately before the accident and its fair market value after the repairs have been made plus the reasonable cost of making the repair."

The instruction given properly permitted the jury to consider either cost of repair if it believed complete repairs were made or the difference in fair market value before and after the accident plus the reasonable cost of repairs if the jury believed that the vessel could not be completely repaired. (Merchant ect. Assn. v. Kellogg E. & D. Co. (1946) 28 Cal. 2d 594, 600.)

Emotional Distress Cause of Action

Gates tes claims that the trial court abused its discretion in granting defendants' motion for summary adjudication regarding emotional distress on three theories: 1. the trial court ruled on the summary adjudication motion during the pendency of a motion for change of venue, 2. he relied upon Port's admission that plaintiffs complied with the claims statutes, and 3. Port failed to comply with certain requirements of the Roster of Public Agencies. We reject these theories.

The pendency of a motion for change of venue under Code of Civil Procedure section 394 does not preclude the trial court from ruling on other matters.(City of Oakland v. Darbee (1951) 102 Cal. App.2d 493, 502-504.)

Port's initial answer to Gates' original complaint admitted that Gates complied with the claims statutes. The trial court, however, granted Port's motion to amend its answer to state that Gates failed to timely file a claim for personal injuries, including emotional distress. None of Gates' administrative claims sought damages for personal injuries, such as emotional distress, and the Gates' first complaint requested no such relief.

One must present a written claim specifying personal injury against a public entity, such as Port, within six months after the date of accrual of the cause of action . (Gov. Code, Sec. 911.2, 945.4, 950.2.) "In actions for damages against local public entities, the claims statutes require timely filing of a proper claim as condition precedent to the maintenance of the action. [Citations.] Compliance with the claims statutes is mandatory [citation]; and failure to file a claim is fatal to the cause of action. [Citation.]" (City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 454.)

"[T] he purpose of these statutes is to provide the public entity sufficient information to enable it to adequately investigates claims and to settle them, if appropriate, without the expense of litigation. [Citations.] It is well-settled that claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim. Such knowledge - standing alone - constitutes neither substantial compliance nor basis for estoppel. [Citations.]" (City of San Jose v. Superior Court, supra, 12 Cal.3d at p. 455.)

Unlike the case of Fredrichsen v. City of Lakewood (1971) 6 Cal. 3d 353, Port did not engage unconscionable conduct prejudicially misleading Gates.(See also Driscoll v. City of Los Angles (1967) 67 Cal. 2d 297, 306-310.) Port's insurer began in good faith to negotiate a settlement with Gates before Port denied the claim.

We also reject Gates' vague argument that Port's failure to make "various amendments in the public roster" excuses him from compliance with the claims statutes.

"[F] ailure to file a claim does not bar an action against the public agency if . . . the agency has failed to file in the Roster of Public Agencies . . . .information concerning itself which substantially conforms to the requirements of [Gov. Code] section 53051 . . . .[E]ach agency shall file . . . a statement containing (1) its name and address, (2) the name and address of each member of the governing board, and (3) the name , title and address of the officers. Within 10 days of any change in the foregoing data, an amended statement reflecting the changes must be filed." (Wilson v. San Francisco Redevelopment Agency (1977) 19 Cal.3d 555, 557-558.)

"[T]he failure to present a claim does not constitute a bar . . . to the maintenance of a suit . . . if . . .the information contained [in the statement or amended statement] is so inaccurate or incomplete that it does not substantially conform to the requirements of [Gov. Code] Section 53051." (Wilson v. San Francisco Redevelopment Agency, supra, 19 Cal.3d at pp. 559-560; see Gov. Code, section 946.4, subd. (a) (2).)

Port substantially complied with these requirements. Furthermore, Gates was able to file a timely, abeit incomplete, claim. Accordingly, the trial court did not err in refusing to give a jury instruction which would permit damages for emotional distress.

Other Instructional Error Asserted

Gates also questioned the trial court's refusal to give BAJI No. 3.45 (7th ed. 1986) regarding negligence per se for violation of statutes. The court properly refused to give this instruction because it would have required the jury to sift through a " huge pile of randomly selected" safety orders,

Department of Motor Vehicle and Vehicle Code statutes irrelevant to the case.

Gates also objected to the trial court's refusal to give standard BAJI instructions No. 11.53 (7th ed. 1986). They contend that giving modified BAJI No. 11.53 burdened the jury by requiring it to differentiate between district property in general and the specific hoist used. Because the evidence did not concern statutes relevant to plaintiffs' proffered instruction, the court properly refused to give it.

Evidentiary Rulings Challenged

Gates contends that the trial court erred in refusing to permit the introduction of a marine survey and certain expert witnesses' testimony.

Tjrough min limine discussion on the morning trial commenced, the trial judge ascertained that Gates failed to disclose one of his experts, Mr. Adams. The judge denied Gates' request to permit hgim to testify as an expert witness because, " . . . you've had ample time to disclose your experts in this matter. There would be a severe hardship to the defense to allow late disclosure. They never had a chance to depose the gentleman, a process that is considered absolutely essential . . . ." For the same reason, the court refused to allow Doug Jones to testify as an expert witness. In addition, the trial court properly sustained objection to the introduction of a status report prepared by Doug Jones because Gates failed to provide notice that he was an expert witness.

The trial court properly denied the admission of a survey report prepared by undisclosed expert, Mr. Frendenburg, who passed away before Port had an opportunity to depose him. It is inadmissible hearsay.(Evid. Code, sec. 1200, 801, 802, 803, 804; People v. Coleman (1985) 38 Cal.3d 69, 92-93; Moesian v. Pennwalt Corp. (1987) 191 Cal. App.3d 851, 860.)

The court properly sustained objections to the introduction of some documents because they are inadmissible hearsay. They include: a letter and a document from the Division of Occupational Health and Safety regarding certification of Port's mobile boat hoist (Exh. 52 and 53), a report on hoist facility improvements (Exh.57), part of exhibit 58, an Army Corps of Engineers survey and business records, a letter and surveys of Mr. Fredenberg, a survey by Captain Fosse (Exh. 91). 2/

The trial court correctly refused to permit into evidence most of a preliminary "port interior configuration and economic feasibility study" because the witness reading it was " not familiar with the entire works of the document . . . ." The witness testified : "This report I'm not familiar with, so I'm not sure which plan that was."

Because of lack of foundation, confusion of the issues and the impracticality of obtaining headphoned for

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2/ At oral argument, Gates tendered the deleted portion of Exhibit 58 for our consideration. Gates has not demonstrated as a matter of law that the deleted portion of Exhibit 58 was admissible.

the jury, the trial court properly sustained objections to the entry of various tapes and transcripts thereof.

Gates placed before the jury substantial expert witness testimony and documentary evidence. The court liberally allowed such evidence whenever Gates laid a proper foundation, especially when they offered evidence for appropriately limited purposes.

Inconsistent Verdicts

Gates asserts that the jury's verdicts that Port was negligent and that Port did not breach the contract are fatally inconsistent. A judgment or verdict which is inherently and logically inconsistent cannot be upheld. A judgment is subject to reversal unless the apparent inconsistency can be reasonably reconciled. (Brewer v. Simpson (1960) 53 Cal.2d 567, 584.)

Gates urges that the duty of care arose out of the contract itself. (Langley v. Pacific Gas & Electric Co. (1953) 41 Cal.2d 655,662.) Gates argues that because Port negligently performed the contract, he is not responsible to pay for it. Not so.

The obligation to exercise due care is broader than and is independent of contract obligations. As the Supreme Court stated in Jones v. Kelly (1929) 208 Cal. 251, 255, "[t]he law imposes the obligation that 'every person is bound without contract to abstain from injuring the person or property of another . . . .' (Sec. 1708, Civ. Code.) This duty is independent of the contract and attaches over and above the terms of the contract."

"A tort may grow out of or make a part of, or be coincident with a contract." (Jones v. Kelly, supra, 208 Cal. at p. 255; see generally Gruenburg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 578; Younan v. Equifax, inc. (1980) 111 Cal. App.3d 498, 511.)

Where, as here , the complaint states a breach of duty growing out of the contract, it is ex delicto (Jones v. Kelly, supra, 208 Cal. at p. 254.) The complaint and proof both established that Port's negligence only " incidentally involves a breach of the contract." (Id., at pp. 254-255.) Because Gates alleged and proved that Port violated broader duties in negligence, independent to the contract, the jury's finding that Donald Gates breached the contract is not irreconcilable with the negligence verdict. As the trial court stated, the verdict for the hauling fee is merely an offset against the negligence verdict rendered by the jury.

Nonsuit to Individuals

Gates claims that the trial court erroneously granted nonsuit to individuals of the hoist crew, Norman Coy, Jr., Matt Collar and Bill Barrow. Port moved for nonsuit because Gates failed to mention the potential liability of these individuals in their opening statement.

Although the opening statement was not transcribed, the trial court explained on the record, "you [Mrs. Gates] did not state to the jury any evidence that you intended to prove that any particular individual linesman was negligent." All intendments and presumptions are indulged to support [a judgment or order] on matters as to which the record is silent, and error must be affirmatively shown." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, Section 268, p. 276.)

Mrs. Gates referred to Jack Rodin, Jr., only as " the linehandler on the port stern when the chock broke." She said that he "lost his line and fell down, and that constituted negligence." The trial court ruled: "As to three of the linesmen, at least, you haven't even come close [to asserting a cause of action as to a named individual] because you haven't said anything that they did was wrong."

The court denied nonsuit as to Jack Rodin because "she has stated facts that that linesman did fall down and drop his rope causing the accident. " The court liberally permitted the action to proceed as to Rodin, and properly granted nonsuit as to the other three linesmen.

Directed Verdict re: Marlin Stebbins

Gates assigns as error the directed verdict granted Marlin Stebbins, the superintendent and agent for Port.

The trial court may grant a directed verdict when" "disregarding conflicting evidence, and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence of sufficient substantially to support a verdict in favor of such party . . ."(Walters v. Bank of America Ect. Assn. (1937) 9 Cal.2d 46, 49; Dailey v. Los Angeles Unified School Dist. (1970) 2 Cal.3d 741. 745.)

Gates claims error because he established that Stebbins invited them to bring their vessel into the hoist facility even though he knew, and willfully failed to disclose, the excessive surge, silting and shallowness of water with the facility.

The trial court properly granted the motion because Gates never alleged they were injured by misrepresentation. The complaint stated that Stubbiness had "control of the vessel" and that he "negligently and carelessly allowed the

vessel to fall and sway , striking the lift and adjacent supports." Because there is no evidence that Stebbins participated in the acts alleged, he may not be held liable for them.

Misconduct of Court, Counsel and Jury

Gates claims a broad variety of misconduct by the trial court and defense counsel. We briefly consider the intelligible issues raised. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, sec. 479, p.470.)

Gates assigns as error repeatedly sending this matter out for binding arbitration and continuing the setting of a trial date. Gates moved to disqualify all the judges in the San Luis Obispo County Superior Court, and now suggests, without substantiation, that the presiding judge made a determination about this case long before trial. Arbitration is a favored method of resolving disputes efficaciously, and the trial court properly used its discretion to calendar this action. We commend the trial court for its effort in attempting to persuade the parties to settle this matter before expending precious judicial resources.

Gates assigns error to the trial court for permitting their previous attorney, Peter Goldenring, to withdraw from the case. Mr. Goldenring's declaration states, inter alia, "[w]e failed to reach agreement concerning the handling of the case and its preparation for trial. They failed and refused to execute a Substitution of Attorneys and also refused to leave my office, whereupon I was required to call the Ventura Police Department for their assistance in removing the plaintiffs from the premises." Gates concedes having "engaged a total of seven attorneys during these past five years" He opines that "[e]ach relationship ended for its own good reason." The trial court properly permitted Mr. Goldenring to withdraw from this case.

Gates complains of court and counsel blocking unspecified discovery efforts. Gates does not state how the court improperly denied his ex parte motion on a discovery matter, and we shall not speculate on the matter.

During this action, Gates improperly stopped a deposition in progress, failed to comply with rules of court to compel discovery and failed to try to resolve discovery matters prior to their motion to compel discovery. (See Code Civ. Proc., section 2025, subd. (o).) The trial court imposed sanctions because of these dereliction's of duty.

Gates complains that the court granted motions for summary adjudication, summary judgment and judgment on the pleadings as to all individual defendants, except Jack Rodin, without signing orders thereon or serving plaintiffs until after trial was completed.

Gates objected at the hearing on these motions and by in limine motions, stating they did not know which individuals would remain parties to the case.

Although the trial court did not sign these motions. Failure to timely sign these orders did not result in prejudice. The trial court properly granted summary judgment as to defendants King, Jenkins, Parsons, Chambers, Blecha and Johansen on the contract cause of action because none of these individuals were parties to the contract. Port entered into the contract with Gates. The above individuals are commissioners of Port and the harbor manager. As mere agents of the contracting party, they are not liable under the contract. (See 1 Witkin, Summary of Cal. Law (8th ed. 1973) Agency & Employment, Section 185, pp. 780-781; Stoiber v. Honeychuck (1980) 101 Cal.App.3d 903, 929.) Other named individuals were not parties to the contract, either. Therefore, the trial court properly granted judgment on the pleadings as to the remaining individual defendants on the contract causes of action.

The trial court also properly dismissed the negligence claims against defendants King, Jenkins, Parsons,

Chambers, Blecha and Johansen because they did not participate in hauling out the vessel. They were supervisors. Under Government Code section 820.8, supervisors cannot be held liable for the acts or omissions of others. (See also Van Alstyne, Cal. Government Tort Liability Practice (1992) Sections 2.56, 2.148, pp. 128, 278-280.)

The trial court also properly dismissed the individual defendants for premises liability. To prove premises liability, one must show, inter alia, that the employee had the authority and the funds available to avoid the dangerous condition. (Gov. Code, section 840.2, 802.8, 821; see generally Bauer v. County of Ventura (1955) 45 Cal.2d 276, 291, which concerned Gov. Code, section 1953, subd. (c), a Storm Drain Maintenance Dist.; Van Alstyne, supra, at section 3.90, pp. 417-418; Taylor v. Buff (1985) 172 Cal.App.3d 384, 388, 390.)

The trial court stated: "I think it is undisputed that the . . . defendants individually did not have the authority or the funds to correct a dangerous condition." They are also immune from liability for any injury caused by their failure, if any, to authorize funds required to fix the condition. (Gov. Code, section 821.) Summary adjudication of these issues provided the grounds for dismissal of the individual defendants.

Gates asserts that defense counsel improperly contacted juror Blakeslee, who had prior association with defense counsel's firm, to obtain knowledge of the contents of a letter presented to the trial judge. Gates also argues that Blakesleee had prejudged the case and that the jury was inattentive.

Gates presents no objective, admissible evidence of juror misconduct. He refers only to the jury foreman's statement that he thought that Blakeslee had prejudged the case. This subjective evidence of theoretical jury misconduct is not admissible. (Hasson v. Ford Motor Co. (1982) 32 Cal.3d 388, 411, 413.) Nor may we consider an

unsubstantiated charge of disclosure of privileged documents.

Validity of Exculpatory Clause in Contract

In its cross-appeal, Port maintains that it is not liable to Gates because Donald Gates knowingly and willingly signed its contract which contains the following exculpatory clause:

"I understand I am responsible for the above boat, her personnel and equipment while she is on the mobile hoist or Harbor lands. I understand the Harbor District, agents or personnel are not liable for damage to my vessel while it is on Harbor property or in hoist slips. In no way do I consider the Harbor District as an insurer. I am liable for any damages."

The trial court refused to give jury instructions proffered by either plaintiffs or defendants. Instead, the trial court instructed on this issue as follows:

"An exculpatory or 'hold harmless' clause is a clause contained in the contract which is intended by the parties to limit a party's liability in the event that one party should negligently cause damage or injury to the other party.

"Parties to a contract are free to insert such clauses in a contract. A party who by contract agrees to accept a risk of harm arising from the other party's negligence cannot recover for such harm. The law recognizes that such clauses are not contrary to public policy.

"The exculpatory language purporting to excuse defendants from liability for damages may stand and be enforced only if it does not involve or affect the public interest.' An attempted exemption from liability affects the public interest and is invalid if the transaction exhibits some or all of the following characteristics.

"1. It concerns a business of a type generally thought suitable for public regulation.

"2. The party seeking exculpation is engaged in performing a service of great importance to the public,

which is often a matter of practical necessity for some members of the public.

"3. The party holds himself out as willing to perform this service for any member of the public who seeks it or at least for any member coming within certain established standards.

"4. As a result of the essential nature of the service in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

"5. In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and

"6. Finally, . . . as a result of the transaction, the person or property of the plaintiff is placed under the control of the defendant subject to the risk of carelessness by the defendant or his agents."

This instruction correctly states the criteria provided by the Supreme Court. (Tunkl v. Regents of the University of California (1963) 60 Cal.2d 92, 98-101.)

In Gardner v. Downtown Porche Audi (1986) 180 Cal.App.3d 713, the court held invalid an automobile repair garage's preprinted disclaimer of liability regarding loss of cars by theft. The appellate court held that such a disclaimer violates public policy based upon the criteria elucidated in Tunkl. Garages are suitable for public regulation. They perform a service of great importance to the public which need working cars to function in society. The hold themselves out as willing to perform the service for any member of the public. Garages possess a decisive advantage of bargaining strength against members of the public seeking their services. The garage included the exculpatory language in a standard printed form which all customers were

expected to sign before the garage began work on the car. Lastly, the security of the automobile was entirely in the hands of the garage owners and its employees. (Id., at pp. 718-720; see also Pelletier v. Alameda Yacht Harbor (1986) 188 Cal.App.3d 1551 [On two occasions, Alameda failed to prevent vandalism to boat which resulted in its sinking. Court held invalid exculpatory clause in harbor district lease for boat slip even though the case involved mere passive negligence.]; Salton Bay Marina, Inc. v. Imperial Irrigation District (1985) 172 Cal.App.3d 914 [Exculpatory clause purporting to discharge water district from liability for damage or injury caused by flooding held invalid.].)

Here, Port is a public entity authorized and regulated by statute. (Harb. & Nav. Code, section 6000 et seq.) As a common carrier, Port holds itself out to the general public to perform necessary services regarding the operation and safety of vessels. Such services are of great importance to the boating public.

Because of the essential nature of its services to certain members of the public, and the limited availability of such services, Port possesses a decisive advantage in bargaining strength with the public. It is able to confront the public with broad, vague and standardized printed contract presented to Mr. Gates. (And see Steven v. Fidelity & Casualty Co. (1962) 58 Cal.2d 862, 879.) Mr. Gates entrusted control of his boat to Port, a common carrier, subjecting himself to the risk of Port's carelessness.

The clause at issue is vague. Among other things, it is not clear exactly what the parties "bargained " for - exemption from violation of statutes, health and safety laws, active negligence, passive negligence, vandalism, or acts of God.

"[A]n agreement which purports to release, indemnify or exculpate the party who prepared it from liability for that party's own negligence . . . must be clear explicit and comprehensible in each of its essential details."

(Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App.3d 309, 318.)

This purported exculpatory clause is invalid because it is vague, overbroad, violative of stature (see Civ. Code, sections 1668, 2175) and against public policy. As the appellate court stated in Gardner, "even assuming he read and understood it, we find the attempted exemption from liability to be against public policy and thus ineffective . . . ." (Gardner v. Downtown Porsche Audi, supra, 180 Cal.App. 3d at p. 715.)

Costs, Fees and Prejudgement Interest

There is no merit to Gates' contention that the trial court abused its discretion in striking his request for expert witness fees. Gates received less than his Code of Civil Procedure section 998, subdivision (d) offer.

Gates assigns error to the award of fees for depositions of certain individual defendants. Under Code of Civil Procedure section 1032, subdivision (b), "a prevailing party [e.g., one with a net monetary recovery - see subd. (a)(4)] is entitled as a matter of right to recover costs . . . ." "(a) The following items are allowable as costs under Section 1032: . . .
[ ] (3) . . . necessary depositions . . . ." (Code Civ. Proc., section 1033.5.)

Here, the trial court ruled that Gates failed to show that these fees were unnecessary. The trial court allowed deposition fees for all witnesses except those not called to testify at trial. The court did not abuse its discretion in its allocation of these costs. (Code Civ. Proc., section 1032, subds.(a)(4), (b); 1033.5 subd. (3).)

Gates contends that the trial court abused its discretion in denying them prejudgment interest on the contract action. Civil Code section 3287, subdivision (b) provides that one entitled "to receive damages based upon a cause of action in contract where the claim was unliquidated,

may also receive interest thereon in the court's discretion." Here, Gates failed to recover on the contract; he recovered on negligence.

Gates also argues entitlement to recover prejudgment interest under Civil Code section 3287, subdivision (a). Under Civil Code section 3287, subdivision (a), one may recover "damages certain, or cable of being made certain by calculation . . . ." This statutory rule does not apply, when, as here, the amount of damages awarded "depends upon the jury's resolution of conflicting evidence." (Marine Terminals Corp. v. Paceco, Inc. (1983) 145 Cal.App.3d 991, 995.)

Gates also seeks attorney fees under Code of Civil Procedure section 1021.5 and Civil Code section 1717. Neither statute applies to the instant case. Code of Civil Procedure section 1021.5 states, in pertinent part, "a court may award attorney's fees to a successful party against one or more opposing parties in action which has resulted in the enforcement of an important right affecting the public if: (a) a significant benefit . . . has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate . . . ." (See Serrano v. Priest (1977) 20 Cal.3d 25, 35; Woodland Hills Residents Assn. Inc. v. City Counsel (1979) 23 Cal.3d 917, 933-935.)

This action did not confer a significant benefit on the general public or on a large class of people nor did it result in the enforcement of an important right affecting the public interest. This case is a personal negligence action, albeit heavily litigated. Any benefit conferred upon the public by the court's ruling the exculpatory contract invalid is coincidental to the action and is therefore not compensable by private attorney general fees. (Beach Colony II v. California Coastal Com. (1985) 166 Cal.App.3d 106, 114.)

Civil Code section 1717 states, in pertinent part: "(a) In any action on a contract, where the contract specifically

provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees . . . and shall be an element of the costs of suit."

"[T]he court . . . shall determine who is the party prevailing on the contract for purposes of this section . . .Except as provided in paragraph (2), the party prevailing on the contract shall be the party whorecovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (Emphasis added.)

Both Gates and defendants seek attorney's fees under Civil Code section 1717. Neither is entitled thereto . The trial court properly exercised its discretion in ruling that neither party prevailed on the contract for purposes of Civil Code section 1717. The trial court stated, and we agree, that this case is "essentially a tort case for negligence." (See generally Jefferson v. J.E. French Co. (1960) 54 Cal.2d 717, 718-719; Boyd v. Oscar Fisher Co., Inc. (1989) 210 Cal.App.3d 368, 377; Voth v. Wasco Public Utility Dist. (1976) 56 Cal. App.3d 353, 356-357.)

As the trial court explained to defendants, "your prevailing on your counterclaim is just in the nature of a minor set-off against the tort recovery. And that in every sense of the word, the plaintiff is the prevailing party in this case." The trial court sympathized with defense council by stating, "[i]t became a very difficult case and you should not have been put to that burden. But I know of no way to award you those fees."

When entreated to find under Civil Code section 1717 that defendants prevailed on the contract, the court said, "No. I don't find--I can't find that. That would be distorting the case to try to find that. Plaintiffs prevailed in this case. You had a minor setoff for the $2000, the unpaid

bill." And, defense counsel conceded that it would be extremely hard to allocate attorney's fees as to individual defendants on the hauling bill.

Port's motion to dismiss Gates' appeal is denied. The judgment is affirmed. Parties to bear their own costs.

NOT TO BE PUBLISHED. YEGAN, J

We concur: STONE, P.J. GILBERT , J.

January 27, 1997

Dan Lungren
California Attorney General
1515 K Street
Sacramento, CA 95814

Dear Mr. Lungren:

I have attempted to interest you in this matter during the past several years without success. I have enclosed a copy of my Writ of Certiorari to the United States Supreme Court in regards to Civil Appeal No. 094604, (underlying case Numbers CV 61331 and 075846).

Your office declined to investigate and showed no interest in the injustice which occurred, nor fact the two judges of San Luis Obispo County Superior Court and the law firm Sinsheimer, Schiebelhut & BAGGETT committed a felony and crime against public justice in theft of jury verdict forms and altering public records by inserting a second set of verdict forms in record, out of court and off the record, without approval of the parties to the case.

The County District Attorney performed a cursory investigation and closed the file. Thereafter the District Attorney competed for the open seat on the Superior Court.

The County Grand Jury promised to investigate the District Attorney if he failed to perform a thorough investigation, but they also closed the file without investigation

I have addressed the United States Attorney General on this matter and hope you will investigate and cooperate with her for better for justice in California Courts, District Attorney's Offices and California Grand Juries. There is something very wrong in our system when judges can conspire with defense attorneys and alter public records which deprives the public of fair trials.

Thank you for your attention to this matter.

Sincerely Yours, s/Eva M. Gates

February 5, 1997

Eva M. Gates
140 South Dolliver Street #69
Pismo Beach, CA 93449

Dear Mrs. Gates:

This is in response to your letter to Attorney General Dan Lungren.

If you have information which you believe may indicate criminal conduct on the part of any of the individuals referred to in your letter, we suggest you submit firm proof to the district attorney in the county where the incident occurred.

The state Attorney General undertakes the role of a prosecuting officer in specific cases only when a county district attorney is disqualified from the case or when he or she (without justification) fails to act.

Because you may need your documents in further action, we are returning them to you.

Thank you for writing.

Sincerely,

DANIEL E. LUNGREN
Attorney General

S/Peggy Paine, Analyst
Public Inquiry Unit

pp:lsv

Enclosure

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

EVA M. GATES, Plaintiff,

v. Case No. CV-075846

THE COUNTY OF SAN LUIS OBISPO, et al., Defendants,

FIRST AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS, NEGLIGENCE PER SE NEGLIGENCE, FRAUD AND DECEIT, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, TAX REFUND DAMAGES, AND EXEMPLARY DAMAGES

(Filed December 19, 1994)

GENERAL ALLEGATIONS

Plaintiff alleges:

1. At all times mentioned herein, plaintiff was, and is now a resident of the County of San Luis Obispo, State of California.

2. All actions and omissions alleged herein took place in San Luis Obispo County, State Of California and all injury sustained by plaintiff was incurred in said country. Plaintiff further alleges that the amount of injury, damages, loss, or harm suffered by the plaintiff is within the jurisdiction of the above-entitled court .

3. Defendant, COUNTY OF SAN LUIS OBISPO, is a government entity organized pursuant to the law of the State of California and is responsible for providing services to the residents who live within its jurisdiction. Among other programs administered by the COUNTY OF SAN LUIS OBISPO , the COUNTY administers the Superior Court in

and for the County of San Luis Obispo. Defendant COUNTY OF SAN LUIS OBISPO also administers, supervises, and funds the San Luis Obispo County District Attorney's Office and the San Luis Obispo County Assessor's Office.

4. Defendant, PORT SAN LUIS HARBOR DISTRICT, is a government entity which conducts the affairs of a special service district formed under the laws of the of the State of California. Said defendant is established and its principal place of business is located at Port San Luis, Avila Beach, in the County of San Luis Obispo, State of California.

5. Defendant WARREN C. CONKLIN was the presiding judge for the Superior Court for the San Luis Obispo County at all times mentioned herein concerning the Superior Court for San Luis Obispo County.

6. Defendant R. DONALD CHAPMAN was assigned as trial judge in San Luis Obispo County Superior Court Case No. CV 61331 also known as Gates v. Port San Luis Harbor District.

7. Defendant SINSHEIMER, SCHIEBELHUT, & BAGGETT is a professional corporation whose principle place of business is located in San Luis Obispo, California. Said defendant was the attorney of record for defendant PORT SAN LUIS HARBOR DISTRICT in the case referred to in paragraph 6.

8. Defendants STEVEN J. ADAMSKI AND ROBERT K. SCHIEBELHUT are attorneys employed by defendant SINSHEIMER, SCHIEBELHUT, & BAGGETT whom plaintiff alleges are responsible for injury, damage, loss, or harm suffered by plaintiff as alleged hereinafter.

9. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 10, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that

each of said fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that the injuries herein alleged were proximately caused by said acts.

10 At all times mentioned herein, defendants DOES 1 through 10 were the agents, servants, and employees of the defendant COUNTY OF SAN LUIS OBISPO or defendant PORT SAN LUIS HARBOR DISTRICT, and were acting at all times within the scope of their agency and employment, and with knowledge and consent of their principal and employer.

11. ON or about December 30, 1993 plaintiff EVA GATES filed claims for damages with the COUNTY OF SAN LUIS OBISPO and there after she filed the claim for damages with PORT SAN LUIS HARBOR DISTRICT under the Government Tort Claims Act wherein Plaintiff Gates alleged that defendant COUNTY OF SAN LUIS OBISPO and defendant PORT SAN LUIS HARBOR DISTRICT, through its employees, servants, and agents did wrongfully and willfully deprive the plaintiff of a fair trial and otherwise injure the plaintiff as alleged herein. A copy of her claim is attached hereto as Exhibit A and incorporated by this reference as if fully set forth herein.

12. Plaintiff is informed and believes that on that basis alleges that the claim she filed with defendant COUNTY OF SAN LUIS OBISPO was denied by said defendant and notice thereof was mailed to plaintiff on January 1j8, 1994; and that the claim she filed with defendant PORT SAN LUIS HARBOR DISTRICT was denied as contemplated by the Government Tort Claims Act.

13. Plaintiff is informed and believes and on that basis alleges that her damages and injuries are the proximate result of actions by defendant COUNTY OF SAN LUIS OBISPO, its employees, servants, and agents and defendant PORT SAN LUIS HARBOR DISTRICT, its employees, servants, and agents and that the amount of damages is within the jurisdiction of this court.

14. Plaintiff EVA M. GATES exhausted her administrative remedies on October 4, 1993, prior to her filing of Government Tort Claims with the defendants as aforementioned. Plaintiff, having exercised due diligence, discovered facts giving rise to her claims against the defendants herein in August 1993.

FIRST CAUSE OF ACTION

Defendants "THE COUNTY OF SAN LUIS OBISPO " SUPERIOR COURT; COUNTY OF SAN LUIS OBISPO; PORT SAN LUIS HARBOR DISTRICT; SINSHEIMER, SCHIEBELHUT, & BAGGETT, a professional corporation; STEVEN J. ADAMSKI; R. DONALD CHAPMAN; ROBERT K. SCHEIBELHUT; WARREN C. CONKLIN; and DOES 1 through 10.

(Violation of Statues - Negligence per se)

As a first cause of action plaintiff alleges:

15. Plaintiff hereby realleges paragraph 1 through 14 of the general allegations and incorporates said allegation herein as if fully set forth.

16. Plaintiff was the prosecuting party in a breach of contract action and cross-defendant in a cross-complaint for breach of contract, under the jurisdiction of the Superior Court for the County of San Luis Obispo known as Gates v. Port San Luis Harbor District (CV 61331).

17. The trial judge in the action described in paragraph 16 was Judge R. Donald Chapman. The presiding judge for the court who assigned and supervised the action tried by Judge Chapman was Judge Warren C. Conklin. Judge Conklin further relieved Judge Chapman who set the hearing of the jury's verdict before Judge Conklin for January 2, 1991. Both of these judges were acting in their capacities as judges for the San Luis Obispo Superior Court

which is administered by defendant COUNTY OF SAN LUIS OBISPO.

18. On or about December 28, 1990 through December 31, 1990 special verdict forms for each cause of action and a finding as to the enforceability of the defendant's exculpatory clause of the contract were taken from the locked courtroom and locked evidence room of the Veteran's memorial building where the trial in the above mentioned matter was being held. The special verdict forms were switched to and replaced with general verdict forms for one finding of compensatory damages. This took place outside the court and off the record.

19. Plaintiff is informed and believes and thereon alleges that covert ex parte meeting and telephone conversations took place between Judge Warren c. Conklin, Judge R. Donald Chapman, and defense counsel for defendant PORT SAN LUIS HARBOR DISTRICT in which they conspired to affect the decision of the jury and produce a verdict based on extra-judicial considerations.

20. Plaintiff is informed and believes and thereon alleges that the unlawful taking of jury verdict forms described in paragraph 18 was conducted in stealth with the assent of Judge Warren C. Conklin, Judge R. Donald Chapman, and representatives of defendant PORT SAN LUIS HARBOR DISTRICT.

21. Plaintiff is informed and believes and thereon alleges that the trial judge , R. Donald Chapman, and presiding judge, Warren C. Conklin were negligent in the discharge of their mandatory administrative responsibilities in that they failed to take or initiate appropriate disciplinary measures with the appropriate disciplinary body when they became aware that the verdict forms had been illegally removed, out of court and off the record, from the court file and switched to inappropriate jury verdict forms bearing the captioned face sheet of the law firm for defendant PORT

SAN LUIS HARBOR DISTRICT, Sinsheimer, Schiebelhut, and Baggett bearing the signature of Steven J. Adamski.

22. Plaintiff is informed and believes and thereon alleges that the acts complained of in this first cause of action were in violation of California Penal Code sections 115 and 182 and that these acts "perverse or obstruct justice, or the due administration of the laws"; that plaintiff is among that class of persons these statutes were designed to benefit or protect ; and that the injury suffered by the plaintiff is the kind of injury such statutes are designed to avoid.

23. Plaintiff is informed and believes and thereon alleges that the acts complained of in this first cause of action were in violation of California Government Code section 6200; that plaintiff is among that class of persons the statute was designed to benefit or protect; and that the injury suffered by the plaintiff is the kind of injury such statute is designed to avoid.

24. Plaintiff is informed and believes that the defendants were negligent per se in violating the aforementioned statutes and that the acts of the defendants were the proximate and legal cause of plaintiff's injuries.

WHEREFORE, plaintiff prays judgment against all defendants and DOES 1 through 10 as follows:

1. For general damages in an amount according to proof;

2. For special damages in an amount according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

SECOND CAUSE OF ACTION

Defendants " THE COUNTY OF SAN LUIS OBISPO " SUPERIOR COURT; COUNTY OF SAN LUIS OBISPO; PORT SAN LUIS HARBOR DISTRICT; SINSHEIMER, SCHIEBELHUT, & BAGGETT, a professional corporation; STEVEN J. ADAMSKI; R. DONALD CHAPMAN; ROBERT K. SCHEIBELHUT; WARREN C. CONKLIN and Does 1 through 10.

(Violation of Civil Rights - 42 USC 1983)

As a second separate and distinct cause of action plaintiff alleges:

25. Plaintiff hereby realleges paragraphs 1 through 14 of the general allegations and paragraphs 15 through 24 of the first cause of action and incorporates said allegations herein as if fully set forth.

26. Plaintiff is informed and believes and thereon alleges that the unlawful taking of jury verdict forms described in paragraph 18 was conducted in stealth with the assent of Judge Warren C. Conklin, Judge R. Donald Chapman, and attorneys, agents, and representatives of defendant PORT SAN LUIS HARBOR DISTRICT in reckless disregard and indifference to the rights of the plaintiff and with willful and wrongful intent to affect the jury's decision and of depriving plaintiff of a fair trial and that such acts did in fact deprive plaintiff of a fair trial.

27. Plaintiff is informed and believes and thereon alleges that the defendants conspired, under color of authority, to deprive plaintiff of her federally protected right to a fair trial in violation of the Fourteenth Amendment to the United States Constitution.

28. Plaintiff is informed and believes and thereon alleges that the acts complained of in this second cause of action were proximate and legal cause of injury to plaintiff.

WHEREFORE, plaintiff prays judgment against all defendants and DOES 1 through 10 as follows:

1. For general damages in an amount according to proof;

2. For special damages in an amount according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Third Cause of Action

Defendant COUNTY OF SAN LUIS OBISPO, and DOES 1 through 10

(Negligence)

As a separate and distinct third cause of action plaintiff alleges:

29. Plaintiff realleges paragraph 1 through 14 of the general allegation, paragraphs 15 through 24 of the first cause of action, and paragraphs 25 through 28 of the second cause of action and incorporates said paragraphs by this reference as if fully set forth herein.

30. Plaintiff reported the criminal activities of the defendants to the District Attorney for San Luis Obispo County and to the Grand Jury for San Luis Obispo County. Part of plaintiff's claim referenced in paragraphs 11 and 12 concerned these reports.

31. Defendant SAN LUIS OBISPO COUNTY, its employees, agents, and representatives, failed to investigate or complete an investigation of the alleged crimes and was in fact negligent in the investigation. The defendant failed to question Defendants CONKLIN, CHAPMAN, ADAMSKI,

or SCHIEBELHUT, the court clerks, the court reporter, the bailiffs, or the jury foreman in the case referenced by paragraph 16 nor did they inspect the facility where the trial referred to in paragraph 18 took place.

32. As a proximate result of the cause of the custom, practice, policy and negligence of the defendant, the plaintiff has suffered injury, including the deprivation of her rights to privacy and a fair trial.

WHEREFORE, plaintiff prays judgment against defendants COUNTY OF SAN LUIS OBISPO, and DOES 1 through 10 as follows:

1. For general damages in an amount according to proof;

2. For special damages in an amount according to proof;

3. For cost of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Fourth Cause of Action

Defendant COUNTY OF SAN LUIS OBISPO, and DOES 1 through 10

(Violation of Statute - Negligence per se)

As a separate and distinct fourth cause of action plaintiff alleges:

33. Plaintiff realleges paragraphs 1 through 14 of the general allegation, paragraphs 15 through 24 of the first cause of action, and paragraphs 25 through 28 of the second cause of action, and paragraphs 29 through 32 of the third cause of action and incorporates said paragraphs by this reference as if fully set forth herein.

34. Plaintiff is informed and believes and thereupon alleges that California Penal Code section 679 et seq forth plaintiff's rights as the victim of a crime, which includes the

right of an expeditious and diligent investigation and disposition of the criminal conduct she reported to defendant COUNTY OF SAN LUIS OBISPO.

35. Defendants failure to act in accordance with the rights of the plaintiff under California Penal Code section 679 et seq was a violation of said statute. Plaintiff alleges that said statute was designed to protect the rights of a class of persons of which she is a member and that she suffered the kind of harm that the statute was designed to avoid.

36. Defendant's violation of statute is a proximate cause of injury to plaintiff.

WHEREFORE, plaintiff prays judgment against defendants COUNTY OF SAN LUIS OBISPO, and DOES 1 through 10 as follows:

1. For general damages in an amount according to proof;

2. For special damages in an amount according to proof;

3. For cost of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Fifth Cause of Action

Defendants COUNTY OF SAN LUIS OBISPO, and DOES 1through 10

(Violation of Civil Rights - 42 USC 1983)

As a separate and distinct fifth cause of action plaintiff alleges:

37. Plaintiff realleges paragraphs 1 through 14 of the general allegation, paragraphs 15 through 24 of the first cause of action, and paragraphs 25 through 28 of the second cause of action, and paragraphs 29 through 32 of the third cause of action and paragraphs 33 through 36 of the fourth

cause of action and incorporates said paragraphs by this reference as if fully set forth herein.

38. The action of defendant COUNTY OF SAN LUIS OBISPO concerning the investigation of criminal acts alleged by plaintiff were deliberately indifferent to the rights of plaintiff . Such indifference amounts to a policy or custom of indifference to the rights of similarly situated persons as the plaintiff.

39. In addition to violating plaintiff's right to a fair trial, such indifference also violated plaintiff's rights under California Penal Code section 679 et seq. Plaintiff alleges that her rights under said section are federally protected rights as well.

40. Such violation of her civil rights by the defendant it the proximate cause of injury to the plaintiff.

WHEREFORE, plaintiff prays judgment against defendants COUNTY OF SAN LUIS OBISPO, and DOES 1 through 10 as follows:

1. For general damages in an amount according to proof;

2. For special damages in an amount according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Sixth Cause of Action

Defendants "THE COUNTY OF SAN LUIS OBISPO" SUPERIOR COURT; COUNTY OF SAN LUIS OBISPO; PORT SAN LUIS HARBOR DISTRICT; SINSHEIMER, SCHIEBELHUT & BAGGETT, A professional corporation; STEVEN J. ADAMSKI; R. DONALD CHAPMAN; ROBERT K. SCHEIBELHUT; WARREN C. CONKLIN; HARRY E. WOOLPERT; BARRY HAMMER; CHRISTOPHER MONEY and DOES 1 through 10.

(Violation of Civil Rights - 42 USC 1983)

As a separate and distinct sixth cause of action plaintiff alleges:

41. Plaintiff realleges paragraphs 1 through 14 of the general allegation, paragraphs 15 through 24 of the first cause of action, and paragraphs 25 through 28 of the second cause of action, paragraphs 29 through 32 of the third cause of action, paragraphs 33 through 36 of the fourth cause of action, and paragraphs 37 through 40 of the fifth cause of action and incorporates said paragraphs by this reference as if fully set forth herein.

42. Plaintiff hereby alleges that the course of conduct described in her Government Tort Claim, referenced and incorporated through paragraph 11, was designed to, and in fact did, deprive her if her federally protected rights to privacy and to a fair trial. Plaintiff hereby specifically incorporates by this reference as if fully set forth herein , parts 3A(e), and all of Part 3(c) of said claim.

43. Plaintiff is informed and believes and thereon alleges that defendant HARRY E. WOOLPERT was a judge of the above-entitled court who acted concerning aspects of the action referenced in paragraph 6 of this complaint. Plaintiff alleges that Defendant WOOLPERT, defendants, their agents, and representatives invaded plaintiff's privacy by granting and conducting a sixth inspection of plaintiff's home four (4) years after the incident complained of in the case referred in paragraph 6 and that said entry into plaintiff's home was conducted without a search warrant. Plaintiff alleges that said acts were in violation of Federal Law which provides that a documented vessel cannot be entered without a search warrant.

Further, Judge Woolpert denied plaintiff's claim for emotional distress in said case by ruling that the claim was barred by the Government Tort Claim Act as to all defendants. Judge Woolpert deprived plaintiff of due process

and denied plaintiff recovery under joint and several contract liability theory which was the law of the State of California at the time the complaint in said action was filed.

44. Plaintiff is informed and believes and thereon alleges that Defendant BARRY HAMMER was a judge of the above-entitled court who acted concerning certain aspects of the action referenced in paragraph 6 of this complaint. Plaintiff alleges that Defendant HAMMER refused to rule as a matter of law on plaintiff's motion regarding the Fair Responsibility Act of 1986 in the action referred to in paragraph 6. Judge Hammer's ruling in conjuction with the ruling of Judge Woolpert referred to in paragraph 43, deprived plaintiff of due process and deprived plaintiff of recovery under joint and several contract liability theory which was the law of the State of California at the time the complaint was filed.

45. Plaintiff is informed and believes and thereon alleges that Defendant CHRISTOPHER MONEY was a judge of the above-mentioned court who acted concerning certain aspects of the action referenced in paragraph 6 of this complaint. Plaintiff alleges that Defendant MONEY dismissed the public official defendants, the board of Commissioners for the Port San Luis Harbor District, and the Executive Officer of the district by summary judgment on November 6, 1990 as to the complaint before the trial started but refused to sign the order until January 24, 1991, after the trial in the action referred to in paragraph 6.

On November 6, 1990 Judge Money dismissed the Chief Executive Officer and the Public Officials, the Board of Commissioners of the Port San Luis Harbor District from negligence and liability as to the contract action; and dismissed them from negligence and liability as to the bailment action; and dismissed all defendants as to the Premises Liability action , but refused to sign the order until after the trial in said action on January 24, 1991.

46. plaintiff is informed and believes and thereon alleges that this course of conduct was in violation of her civil rights and was a proximate cause of damage, injury , loss, or harm to plaintiff.

WHEREFORE, plaintiff prays judgment against all defendants and DOES 1 through 10 as follows:

1. For general damages in an amount according to proof;

2. For special damages in an amount according to proof;

3. For costs of suit herein incurred ; and

4. For such other and further relief as the court may deem proper.

Seventh Cause of Action

Defendant COUNTY OF SAN LUIS OBISPO, and DOES 1 through 10

(Tax Refund)

As a separate and distinct seventh cause of action plaintiff alleges:

47. Plaintiff realleges paragraph 1 through 14 of the general allegation and incorporates said paragraphs by this reference as if fully set forth herein.

48. Defendant COUNTY OF SAN LUIS OBISPO is responsible for administration and supervision of assessment of properties for tax collection purposes.

49. The San Luis Obispo County Assessor arbitrarily increased the assessed of value plaintiff's home/boat from $13,000 in 1992 to $45,000 in 1993. The yearly tax on this property increased from $67.10 in 1992 to $424.30 in 1993. Copies of tax statements for these years are attached hereto as Exhibits B and C and incorporated by this reference as if fully set forth herein.

50. Plaintiff exhausted her administrative remedies with the San Luis Obispo County Assessor, Dick Frank, and plaintiff alleges that the method of revaluing her property was unsound and that the new assessment is null and void.

WHEREFORE, plaintiff prays judgment against defendants COUNTY OF SAN LUIS OBISPO, and DOES 1 through 10 as follows:

1. For general damages in an amount in according to proof;

2. For specific damages in an amount according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Eighth Cause of Action

Defendants 'THE COUNTY OF SAN LUIS OBISPO " SUPERIOR COURT; COUNTY OF SAN LUIS OBISPO; PORT SAN LUIS HARBOR DISTRICT; SINSHEIMER, SCHIEBELHUT, & BAGGETT, a professional corporation; STEVEN J. ADAMSKI; R. DONALD CHAPMAN; ROBERT K. SCHEIBELHUT; WARREN C. CONKLIN ; HARRY E. WOOLPERT; BARRY HAMMER; CHRISTOPHER MONEY and DOES 1 through 10.

(Fraud and Deceit)

As a separate and distinct eighth course of action plaintiff alleges:

51. Plaintiff realleges paragraph 1 through 14 of the general allegation, paragraph 15 through 24 of the first cause of action, and paragraph 25 through 28 of the second cause of action, paragraphs 29 through 32 of the third cause of action, paragraphs 33 through 36 of the fourth cause of action, and paragraphs 37 through 40 of the fifth cause of

action and incorporates said paragraphs by this reference as if fully set forth herein.

52. Plaintiff is informed and believes and thereon alleges that the acts of the defendants was a fraud on the court and was intended to defraud and deceive the plaintiff.

53. As a proximate result of such acts plaintiff has suffered injury, damage, loss or harm.

WHEREFORE, plaintiff prays judgment against all defendants and DOES 1 through 10 as follows:

1. For general damages in an amount according to proof;

2. For special damages in an amount according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Ninth Cause of Action

Defendants 'THE COUNTY OF SAN LUIS OBISPO " SUPERIOR COURT; COUNTY OF SAN LUIS OBISPO; PORT SAN LUIS HARBOR DISTRICT; SINSHEIMER, SCHIEBELHUT, & BAGGETT, a professional corporation; STEVEN J. ADAMSKI; R. DONALD CHAPMAN; ROBERT K. SCHEIBELHUT; WARREN C. CONKLIN ; HARRY E. WOOLPERT; BARRY HAMMER; CHRISTOPHER MONEY and DOES 1 through 10.

(Intentional Infliction of Emotional Distress)

As a separate and distinct ninth cause of action plaintiff alleges:

54. Plaintiff realleges paragraph 1 through 14 of the general allegation, paragraphs 15 through 24 of the first cause of action, and paragraphs 25 through 28 of the second cause of action, paragraphs 29 through 32 of the third cause

of action, paragraphs 33 through 36 of the fourth cause of action, and paragraphs 37 through 40 of the fifth cause of action and paragraphs 41 through 46 of the sixth cause of action, and paragraphs 51 through 53 of the eighth cause of action and incorporated said paragraphs by this reference as if fully set forth herein.

55. Plaintiff alleges that the acts of the defendants herein complained of were committed with the intention of causing plaintiff emotional distress and that plaintiff did suffer emotional distress as a result thereof. The plaintiff further alleges that the acts of defendants were outrageous and committed in reckless disregard and indifference to the effect such acts would have on the plaintiff's rights and emotional well-being.

WHEREFORE, plaintiff prays judgment against all defendants and DOES 1 through 10 as follows:

1. For general damages in an amount according to proof;

2. For special damages in an amount according to proof;

3. For costs of suit herein incurred ; and

4. For such and other further relief as the court may deem proper.

Tenth Cause of Action

Defendants 'THE COUNTY OF SAN LUIS OBISPO " SUPERIOR COURT; COUNTY OF SAN LUIS OBISPO; PORT SAN LUIS HARBOR DISTRICT; SINSHEIMER, SCHIEBELHUT, & BAGGETT, a professional corporation; STEVEN J. ADAMSKI; R. DONALD CHAPMAN; ROBERT K. SCHEIBELHUT; WARREN C. CONKLIN ; HARRY E. WOOLPERT; BARRY HAMMER; CHRISTOPHER MONEY and DOES 1 through 10.

(Neglient Infliction of Emotional Distress)

As a separate and distinct tenth cause of action plaintiff alleges:

56. Plaintiff realleges paragraph 1 through 14 of the general allegation, paragraph 15 through 24 of the first cause of action, and paragraphs 25 through 28 of the second cause of action, paragraph 29 through 32 of the third cause of action, paragraphs 33 through 36 of the fourth cause of action , and paragraphs 37 through 40 of the fifth cause of action and paragraphs 51 through 53 of the eighth cause of action and incorporates said paragraphs by this reference as if fully set forth herein.

57. Plaintiff alleges that the defendants acts negligently caused the plaintiff emotional distress and that as a proximate result of such negligent conduct the plaintiff has suffered injury , damage, loss, or harm.

WHEREFORE, plaintiff prays judgment against all defendants and DOES 1 through 10 as follows:

1. For general damages in an amount according to proof;

2. For special damages in an amount according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Eleventh Cause of Action

Defendants SINSHEIMER, SCHIEBELHUT, & BAGGETT, a professional corporation; STEVEN J. ADAMSKI; R. DONALD CHAPMAN; ROBERT K. SCHEIBELHUT; WARREN C. CONKLIN; and DOES 1 through 10.

(Exemplary Damages)

as a separate and distinct eleventh cause of action plaintiff alleges:

58. Plaintiff realleges paragraphs 1 through 14 of the general allegation, paragraphs 15 through 24 of the first cause of action, and paragraphs 25 through 28 of the second cause of action, paragraphs 29 through 32 of the third cause of action, and paragraphs 33 through 36 of the fourth cause of action, and paragraphs 37 through 40 of the fifth cause of action and paragraphs 41 through 46 of the sixth cause of action, and paragraphs 51 through 53 of the eighth cause of action and incorporates said paragraphs by this reference as if fully set forth herein.

59. Plaintiff is informed and believes and thereon alleges that the conduct of Defendants SINSHEIMER, SCHIEBELHUT, & BAGGETT, a professional law corporation; STEVEN J. ADAMSKI; R. DONALD CHAPMAN; ROBERT K. SCHEIBELHUT ; WARREN C. CONKLIN; HARRY E. WOOLPERT; BARRY HAMMER; CHRISTOPHER MONEY; and DOES 1 through 10 oppressive and of such a nature that punitive or exemplary damages should be awarded in order to deter future similar conduct.

WHEREFORE, plaintiff prays judgment against Defendants SINSHEIMER, SCHIEBELHUT, & BAGGETT, a professional law corporation; STEVEN J. ADAMSKI; R. DONALD CHAPMAN; ROBERT K. SCHEIBELHUT ; WARREN C. CONKLIN; HARRY E. WOOLPERT; BARRY HAMMER; CHRISTOPHER MONEY; and DOES 1 through 10 as follows:

1. Exemplary or punitive damages in an amount to be determined by the court;

2. Cost of suit; and

3. For such other and further relief as the court may deem proper.

DATED: December 19, 1994

S/Eva M. Gates
Plaintiff in pro per